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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 255

THE ELMHURST CEMETERY COMPANY OF JOLIET, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 3, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

SUPREME COURT OF THE UNITED STATES

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1 The Elmhurst Cemetery Co. of Joliet,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
Docket No. 58813.
Appearances:

For petitioner: J. F. Riordan, Esq.
For respondent: E. A. Tonjes, Esq.

DOCKET ENTRIES.

1931

May 29—Petition received and filed. Taxpayer notified. (Fee paid.)
June 1—Copy of petition served on General Counsel.
July 21—Answer filed by General Counsel.
July 31—Copy served—assigned General Calendar.

1933

Feb. 3—Hearing set March 7, 1933.
Feb. 16—Motion to place on Circuit Calendar for hearing in Chicago, Illinois, filed by taxpayer. 2/23/33 granted.

1934

Jan. 18—Notice of hearing at Chicago beginning March 5, 1934.
Mar. 16—Hearing had before Mr. Goodrich on the merits. 60 day letter filed. Appearance of J. F. Riordan filed. No briefs.
Mar. 31—Transcript of hearing of March 16, 1934 filed.
Dec. 4—Memorandum opinion rendered—E. J. Goodrich, Division 11. Judgment will be entered for petitioner.
Dec. 5—Decision entered—Edgar J. Goodrich, Division 11.

1935

Jan. 10—Motion for additional findings of fact and to modify decision filed by General Counsel. 1/26/35 denied.
Feb. 5—Motion to have order denying motion for additional findings of fact and to modify decision reviewed by the full Board filed by General Counsel.
Feb. 9—Order that "Motion to have order denying motion for additional findings of fact and to modify decision review by full Board" is denied, entered.

Mar. 2—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by General Counsel.
Mar. 16—Proof of service filed by General Counsel. (2)
Apr. 12—Motion for extension to 7/2/35 to complete and transmit record filed by General Counsel.
Apr. 12—Order extending time to 7/2/35 to prepare evidence and deliver record entered.
June 20—Motion for extension to Sept. 2, 1935 to complete and transmit record filed by General Counsel.
June 20—Order that time for preparation of evidence and transmission and delivery of record be extended to Sept. 3, 1935, entered.
Aug. 19—Agreed statement of evidence lodged.
Aug. 19—Praecipe filed with proof of service thereon.
Aug. 20—Agreed statement of evidence approved and ordered filed.
Aug. 31—Order enlarging time for transmission and delivery of record to Sept. 9, 1935, entered.

29. 2 UNITED STATES BOARD OF TAX APPEALS.

The Elmhurst Cemetery Company of Joliet,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 58813.

PETITION.

Filed May 29, 1931.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:D-4: HRL-60D) dated April 30, 1931, and as a basis of his proceeding alleges as follows:

1. The petitioner is a corporation with principal office at East Washington Street, Joliet, Illinois.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on April 30, 1931.

3. The taxes in controversy are income taxes for the calendar years 1926, 1927, and 1928, and for $2,694.30.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

1. Failure to allow 76.6 cents as the March 1st, 1913 value of the improved portion of the cemetery, per square foot.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petitioner has shown actual sales of lots in the improved portion of the cemetery on or about March 1st, 1913, at an average price of at least 76.6 cents per square foot and contends that such sales establish the March 1st, 1913 value of the unsold lots.

(b) The Commissioner has used original cost plus improvements as the basis of value, which method we dispute, for the reason shown in (a), above.

3 (c) The petitioner has produced witnesses who have testified that the March 1st, 1913 value of the improved portion of the cemetery was at least 76.6 cents per square foot, and is prepared to prove the same by competent witnesses.

Wherefore the petitioner prays that this Board may hear the proceedings and decide that the lots in the improved portion of the cemetery had a value of 76.6 cents per square foot on March 1st, 1913.

THE ELMHURST CEMETERY COMPANY OF JOLIET,
By GEO. WARNER YOUNG,
President.

(Corporate Seal)

State of Illinois }
County of Will } ss.

GEORGE WARNER YOUNG, being duly sworn, says that he is the president of the petitioner corporation above named and that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

GEO. WARNER YOUNG.
George Warner Young.

Subscribed and sworn to before me this 20th day of May, 1931.

CHRISTINE L. JENSEN,
Notary Public.

(Notary Seal)

My commission expires 1933.

4 NP-2-26-28

Mailed Apr. 30, 1931.
IT:AR:D-4
HRL-60D

The Elmhurst Cemetery Company of Joliet,
East Washington Street,
Joliet, Illinois.

Sirs:

You are advised that the determination of your tax liability for the years 1926, 1927 and 1928 discloses a deficiency of $2,694.30 as shown in the statement attached.

In accordance with section 274 of the Revenue Act of 1926 and section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability for the years in which a deficiency is disclosed.

However, If You Do Not Desire To Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your returns by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
DAVID BURNET,
Commissioner.
By (Signed) J. C. WILMER,
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870
HLB-3

5 STATEMENT.

IT:AR:D-4
HRL-60D

In re.: The Elmhurst Cemetery Company of Joliet,
East Washington Street,
Joliet, Illinois.

Tax Liability.

Years	Tax Liability	Tax Assessed	Deficiency
1926	$1,294.72	$117.40	$1,177.32
1927	344.43	None	344.43
1928	1,172.55	None	1,172.55
Totals	$2,811.70	$117.40	$2,694.30

Careful consideration has been accorded your protest dated February 5, 1930 in connection with the findings of the examining officer, and the information submitted at a conference held in the office of the internal revenue agent in charge on December 10, 1930, also your protest dated April 11, 1931.

1926.

Net Income.

Net income reported		$ 2,869.61
Add:		
1. Cost of lots sold	$7,864.04	
2. Roads and fence	1,308.58	9,172.62
		$12,042.23
Less:		
3. Depreciation		451.72
Adjusted net income		$11,590.51

Explanation of Changes.

1. This adjustment is due to the 1913 value of 76.6 cents per square foot claimed by you which has been reduced to 23.96 cents per square foot. As the result of an investigation made by this office, it was found that the original cost of your

land was $65,000.00, making the cost $474.45 per acre which corresponds to about 1.1 cents per square foot. The fair market value as at March 1, 1913, of the improved area has, as the result of a conference held in the office of the internal revenue agent in charge at Chicago, Illinois, been placed at $79,-
6 458.55 which corresponds to a value of 13.7 cents per square foot, to which is added the cost of improvements, 10.26 cents per square foot, in arriving at the fair market value of 23.96 cents per square foot for land in the improved area. The records show that 14,939.30 square feet were sold in 1926, which at 23.96 cents per square foot results in a cost to be used of $3,579.46 instead of $11,443.50 and the disallowance of $7,864.04.

2. This item was included in the account "Road and Fence Maintenance" and represents an amount expended for a new iron post and wire fence, which this office has disallowed since it is held to be a capital expenditure. See article 292, Regulations 69.

3. It appears that no depreciation was claimed by you on your return and this office has allowed depreciation in accordance with exhibit attached. See article 161 of Regulations 69.

Computation of Tax.

Net income	$11,590.51
Less:	
Credit	2,000.00
Balance taxable at 13½%	$ 9,590.51
Tax at 13½%	$ 1,294.72
Total tax assessable	$ 1,294.72
Tax previously assessed	117.40
Deficiency	$ 1,177.32

1927.

Net Income.

Net loss reported		$ 1,367.21
Add:		
1. Cost of lots sold	$5,779.32	
2. Excessive depreciation	139.21	5,918.53
Adjusted net income		$ 4,551.32

7 Explanation of Changes:

1. This adjustment is of same character as item 1, under 1926 income adjustment.

Cost of lots sold, claimed	$ 8,409.89
Cost of lots sold, as corrected	2,630.57
Additional income	$ 5,779.32
2. Depreciation claimed	$ 745.28
Depreciation allowed	606.07
Excessive depreciation	$ 139.21

Depreciation has been allowed in accordance with exhibit attached.

Computation of Tax.

Net income	$ 4,551.32
Less:	
Credit	2,000.00
Balance taxable at 13½%	$ 2,551.32
Tax at 13½%	$ 344.43
Total tax assessable	$ 344.43
Tax previously assessed	None
Deficiency	$ 344.43

1928.

Net Income.

Net income reported		$ 2,414.17
Add:		
1. Cost of lots sold	$8,989.56	
2. 1927 net loss eliminated	1,367.51	10,357.07
Adjusted net income		$12,771.24

8 Explanation of Changes

1. This adjustment is of same character as item 1, under 1926 income adjustment.

Cost of lots sold, claimed	$13,081.33
Cost of lots sold, as corrected	4,091.77
Additional income	$ 8,989.56

2. The net loss for the year 1927 which was deducted on your return for 1928 has been eliminated, a net income having been determined for 1927 as shown above.

Computation of Tax

Net income	$12,771.24
Less:	
Credit	3,000.00
Balance taxable at 12%	$ 9,771.24
Tax at 12%	$ 1,172.55
Total tax assessable	$ 1,172.55
Tax previously assessed	None
Deficiency	$ 1,172.55

A copy of this communication has been furnished your representative, Mr. George G. Dunlap, 38 South Dearborn Street, Chicago, Illinois.

9 IT:AR:D-4
HRL-60D

EXHIBIT 1

The Elmhurst Cemetery Company of Joliet
Depreciation

Machinery and Equipment

Year	Month	Balance Close of Period	Additions	Rate	Amended Reserve December 31, 1925	Depreciation	Depreciation
1908 to 1915		$ 425.00	$ 425.00	10%	$ 425.00	—0—	—0—
1924	July	602.50	117.50	10%	27.62	$ 17.75	$ 17.75
1925	July	1,075.03	472.53	10%	23.62	47.25	47.25
1926	July	1,124.09	49.06	10%	—0—	2.45	4.90
1927	July	1,768.64	644.55	10%	—0—	—0—	32.22
Totals					$ 476.24	$ 67.45	$ 102.12

EXHIBIT 2

Buildings

1913	March	$7,457.69	$7,457.69	4%	$3,828.31	$ 298.30	$ 298.30
1926	July	8,485.27	1,027.58	4%	—0—	20.55	41.10
1927	July	9,621.59	1,136.32	4%	—0—	—0—	22.72
Totals					$3,828.31	$ 318.85	$ 362.12

EXHIBIT 3

Office Furniture and Fixtures

1913	—	$ 75.00			$ 75.00	—0—	—0—
1927	July	294.63	$ 219.63	10%	—0—	—0—	10.98
Totals					$ 75.00	—0—	$ 10.98

EXHIBIT 4

Fence

1926	July	$1,308.58	$1,308.58	10%	—0—	$ 65.43	$ 130.85

Depreciation Summary

	To December 31, 1925	1926	1927
Exhibit 1	$ 476.24	$ 67.45	$ 102.12
Exhibit 2	3,828.31	318.85	362.12
Exhibit 3	75.00	—0—	10.98
Exhibit 4	—0—	65.42	130.85
Totals	$4,379.55	$ 451.72	$ 606.07
Debits to reserve	—0—	—0—	—0—
	$4,379.55	$4,831.27	$5,437.34
Total depreciation allowed as amended		$ 451.72	$ 606.07
Total depreciation claimed		None	745.28
		$ 451.72	($139.21)

21. 10 UNITED STATES BOARD OF TAX APPEALS

* * (Caption—58813) * *

ANSWER

Filed Jul 21 1931

The respondent, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of this taxpayer filed May 29, 1931, admits and denies as follows:

1. Admits the allegations contained in paragraph No. 1.
2. Admits that the notice of deficiency was mailed to the petitioner on April 30, 1931, and denies the remainder of paragraph No. 2.
3. Admits the allegations contained in paragraph No. 3.
4. Denies that the respondent erred in determining or computing petitioner's tax liability for the calendar years 1926, 1927 and 1928, as alleged in subparagraph 1 of paragraph No. 4.
5. Denies the allegations contained in subparagraphs (a), (b) and (c) of paragraph No. 5.
6. Denies generally and specifically each and every allegation not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the petitioner's appeal be denied.

(Signed) C. M. CHAREST
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
BRUCE A. LOW,
Special Attorney,
Bureau of Internal Revenue.

35 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
v.
The Elmhurst Cemetery Company of Joliet,
Respondent.
} Docket Number 58813

STATEMENT OF EVIDENCE.

Lodged Aug. 19, 1935.

Filed Aug. 20, 1935.

The following is a statement of evidence in narrative form in the above-entitled cause. This cause came on for hearing before the Honorable Edgar J. Goodrich, Member of the United States Board of Tax Appeals, on the 16th day of March, 1934. J. F. Riordan, Esq., appeared for the petitioner, and E. A. Tonjes, Special Attorney, Bureau of Internal Revenue, appeared for the respondent.

HERBERT W. SPENCER was called as a witness on behalf of the petitioner, and having been duly sworn, was examined and testified as follows:

That his occupation is that of Superintendent of The Elmhurst Cemetery Company. He has been engaged as superintendent since 1913. That he was connected with the Elmhurst Cemetery Company since its organization in 1909; that
36 he is familiar with the property and was familiar with the property on March 1, 1913; that he was familiar with the sales prices of burial lots in the cemetery on March 1, 1913; that the property of The Elmhurst Cemetery Company consisted of 137 acres which was acquired in 1909 at a cost of $60,000; that between the year 1909 and March 1, 1913, the north 37 acres were developed for cemetery purposes. The development consisted of the construction of roads and drives and some pools. The property was leveled off where it was

uneven, and flowers, trees and shrubs were planted. That the
21. cost of the development prior to 1913 was approximately $35,000.00.

It was thereupon, by agreement of counsel, stipulated and agreed that during the year 1909, 7,308.55 square feet were sold at a total price of $5,339.80; during the year 1910, 7,005.55 square feet were sold for a total price of $5,013.71; during the year 1911, 7,312.20 square feet were sold and the amount received therefor was $5,133.95; during the year 1912, 6,320.20 square feet were sold and the amount received therefor was $4,837.39; during the year 1913, there were sold 8,506.10 square feet and the amount received therefor was $6,763.50. The total number of square feet sold during the years 1909 to 1913, inclusive, was 36,452.60 square feet. The amount received therefor was $27,090.35, or an average price per square foot of 74.03 cents. On February 15, 1913, 24 square feet were sold for $10.00; on March 5, 1913, 48 square feet were sold for $50.00; on March 13, 1913, 96 square feet were sold for $75.00; on March 14, 1913, 144 square feet were sold for $111.00. The aggregate sales in square feet is 312, and the amount re-
37 ceived therefor is $264.00, or an average price of 78.08 cents per square foot.

(This concludes the stipulated facts).

During the year 1914, the average price per square foot received by The Elmhurst Cemetery Company for lots sold was 75.6 cents; in the year 1915, 78.1 cents a square foot; in 1916, 80 cents a square foot. During the year 1926, the Elmhurst Cemetery Company sold its burial lots at the rate of $1.55 a square foot; during the year 1927, at the rate of $1.66 a square foot, and in 1928, the average price was $1.77 a square foot. During the year 1926, 14,939.3 square feet of lots were sold; during the year 1927, 10,979 square feet; and in the year 1928, 17,077.5 square feet.

Based on my experience in the cemetery business, it is a fact that as the number of lots remaining unsold decreases, the unsold lots increase in price. I have attended meetings of cemetery men at conventions where matters of this kind were discussed and so far as I have heard, the experience of cemetery men is that lots increases up to a certain point of saturation; it increases for years after the cemetery is organized.

In response to inquiry by the presiding Member, the witness testified as follows:

The sales of burial lots made in 1913 and in 1912 were made

in the normal course of business, and were not the result of a particular advertising campaign or promotion campaign which was going on at that time. We made no extra effort to sell lots at that time at all. The purchase price was es-
38 tablished by my visiting a good many cemeteries that I figured were practically of the same class as that cemetery and situated near cities of about the same population, and I established a price from the price they were selling at. The value of the cemetery is the number of lots you have to a large extent.

The sales of lots in 1912 and 1913 were made by people just coming out, and I sold the lots, nearly all of them. Once in a while the sexton would sell a lot. I simply took them out there and if they wanted to pay, they paid. We sold on time, and for cash, any way they could afford to pay, and I fixed the price. There was a slight rise after March 1, 1913 so that the total average for the year 1913 showed a little higher than the year. 1912—March 1, 1912 to March 1, 1913, the average is 79.5 cents for the year, the fiscal year, while it is 77.6 for the calendar year, the price we contend is the fair market value for March 1, 1912 to March 1, 1913. The average sale price in 1911 was 70.2 cents a square foot. In 1910, the average was 71.5 cents. The discrepancy was caused by selling more square feet in one of the sections that was higher priced than one of the other sections, the size of the lots were anywhere from 150 to 1,500 square feet. That is, outside of the sales of single graves. The standard of a single grave is 24 feet. The lots sold by The Elmhurst Cemetery Company during the years 1926, 1927 and 1928 were owned by the Elmhurst Cemetery Company on March 1, 1913 and they were in substantially the same condition with respect to development.

39 On cross-examination, Mr. Spencer testified as follows:

It would take approximately 50 or maybe 60 years to sell the lots in the improved section of the cemetery. I do not mean that possibly every grave but the bulk of it could be disposed of in 60 or 70 years. In response to a question as to whether the witness meant from the date of trial or 1913, the witness testified—I mean from now. I think that it is possibly too conservative—it might come nearer to 75 years, it would depend largely upon the growth of the community. Every grave and lot in the cemetery sold since its organization is under perpetual care, and when perpetual care is pro-

vided, it means keeping the roads and drives in proper repair, keeping the drainage system in proper repair, keeping the fences in repair, cutting the grass, pruning the trees, shrubs, and keeping it in good condition. It is difficult to say how much it would cost to maintain the cemetery a year, that is, the roads, shrubbery, etc., for the simple reason that it costs more in some years than it does in others. For instance, in a certain year you might have to do extensive repairs; you might make extensive repairs to your drainage at some time, but I would say that it would cost about $4,000.00 a year. You see we cut the grass as high as 37 times in one season—in two years we cut the grass 37 times, but last year we cut it only 28 times because we had such a dry season. If a purchaser desires to buy a lot, he would call at the office and see either the sexton or myself. I draw a salary of $2,400.00 a year. In 1913 I did not draw a salary. I did not draw a salary until 1925. The corporation does not make any contributions to churches or fraternal organizations. The cemetery has on occasion paid 10% commission to undertakers.

Based on the fact that the record shows that the average sales for the years 1909 to 1913 are slightly over 7,000 square feet, I would say that a fair expectancy of sales of burial lots for the entire year 1913 would be between 7,000 and 7,500 square feet.

We hoped for a gradual increase in sales every year because as a general rule, for every head of a family that is buried you secure four new families. That is a rule cemetery companies have adopted.

On redirect examination, the witness testified—I received a salary of $2,400 per annum and I devoted about 10% of my time to the sale of lots. The sexton would also spend about 10% of his time in the sale of lots. The average expense of just taking care of the grounds was about $4,000 a year, such as cutting grass and things like that would at least be $4,000 a year but some years it would be more than that. This is an operating expense and has income to offset that expense. There is income from interments, planting flowers, perpetual care of flowers, when we plant flowers for people that order them, and furnish the flowers and things like that. With reference to the probable length of time it would require to dispose of all of the lots in the developed portion of the cemetery it would take 50 or 60 years from

1934; it is just an estimate, it would depend largely upon
41 the population of the surrounding communities, etc. I arrived at the value of 76.6 cents a square foot by taking the average value of lots sold from March 1, 1912 to March 1, 1913.

After brief oral argument by both counsel, the following colloquy took place:

The Member: That is true. By the record, so far as I have it here, it shows a small but apparently steady increase from year to year. Can you give me any light, Mr. Tonjes, on the basis that the respondent made his valuation?

Mr. Tonjes: Yes, your Honor, I have a report here which was made by the engineer which I will gladly submit to the Court, if the petitioner has no objection.

Mr. Riordan: I think it would be prejudicial to the petitioner's case to permit that to go into evidence when he is not here to be cross-examined.

Mr. Tonjes: That is purely for the purpose of showing how he got that value.

The Member: You say one of the respondent's engineers made a valuation of this thing?

Mr. Tonjes: Yes, that is the cost over the prospective time of sale, reduced to present value.

The Member: Does this report indicate or consider in any way the value of other cemetery properties in or about Joliet?

Mr. Tonjes: No.

The Member: It is simply the discount method of arriving at the valuation.

Mr. Tonjes: Yes.

The Member: Based on cost?

Mr. Tonjes: Costs, improvements, etc.

The Member: I will take this under advisement; I will have to look at the cases involving cemetery valuation.

42 The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, as attorney for the respondent on review.

(Sd) LAWRENCE GRAVES
Attorney for the
Respondent on Review

(Stamp) Approved and ordered filed this 20 day of Aug., 1935. (S) C. R. Arundell Member.

The foregoing is all of the material evidence adduced at the hearing in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this ..... day of ....., 1935

.....
Member, United States
Board of Tax Appeals.

11 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—58813) * *

J. F. Riordan, Esq., for the petitioner.

E. A. Tonjes, Esq., for the respondent.

MEMORANDUM OPINION.

Goodrich: Respondent determined, and petitioner contests, deficiencies in income tax for 1926 of $1,177.32; for 1927 of $344.43; and for 1928 of $1,172.55.

There is but one issue for our decision, namely, what was the fair market value as of March 1, 1913, (which is to be used as cost basis in this case) of the grave plots sold by petitioner during the years here under review? Petitioner reported and here contends that the value was not less than 76.6c a square foot. Respondent refused to accept that value,
12 and determined that the value was 23.96c a square foot. (Both figures take into account expenditures for improvements.) Respondent's use of a lower value than that reported, results in his disallowance of a part of the cost basis in determining the gain upon sales made by petitioner, and, in turn, from that action result the deficiencies here in controversy.

Aside from the question of valuation, the material facts are not disputed. Petitioner is a corporation with its principal office in Joliet, Illinois. About 1909 it purchased 137 acres of land in or about Joliet, which it has since owned and operated as a cemetery. The cost of the tract was $60,000 (according to the testimony: $65,000 according to respondent's deficiency notice). Petitioner improved the north 37 acres of its lands by landscaping, laying out roads, constructing pools, and leveling, all at a cost of about $35,000. From the acreage so improved its sales of grave plots have since been made.

Sales each year from 1909 to 1913, inclusive, and the average selling price per square foot were as follows:

1909	7,308	sq. ft. at	73c
1910	7,005.55	sq. ft. at	71.5c
1911	7,312.20	sq. ft. at	70.2c
1912	6,320.20	sq. ft. at	77.6c
1913	8,506.10	sq. ft. at	79.5c
1913—Month of March	312	sq. ft. at	78.08c

During the years here under review the footage sold and the average selling price were:

1926	14,939.9	sq. ft. at	$1.55
1927	10,979	sq. ft. at	1.66
1928	17,077.5	sq. ft. at	1.77

13 While the issue is not clearly drawn, it is apparent from respondent's deficiency notice, and from the trial record, that the parties are now concerned only with the value as of March 1, 1913, of that 37 acres of petitioner's lands which have been improved and from which sales have been made. Respondent has made no determination as to the value of the unimproved area; and concerning it petitioner makes no claim, offers no proof. We cannot from the record before us make any finding as to the basic value of the unimproved land and perforce are directed only to the limited issue respecting the improved area.

As to the basic value of the improved land, there is a wide difference between the parties. Beyond statements of counsel to the effect that respondent has attempted by formula to reduce the value of the improved land as of March 1, 1913, to present value, we are uninformed as to the method by which he chose the figures at which he fixes the basis for determining gain. Petitioner, however, has chosen as the footage valuation as of March 1, 1913, the selling price of its grave lots

during the year just preceding that date—76.6c—which is less than the average sales price during the month of March 1913.

We are of opinion that the valuation for which petitioner contends is reasonable and should be allowed. It is based upon actual sales, and consequently comes as closely as may be to that fair market value, so often judicially defined as the price which property will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell. S. M. 1428, C. B. IV-I-101; *Fairmount Cemetery Association,* 25 B. T. A. 1272.

Judgment will be entered for the petitioner.

Entered Dec. 4, 1934.

:c. 5. 14 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—58813) * *

DECISION.

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered December 4, 1934, it is

Ordered and Decided: That there are no deficiencies for the years 1926, 1927 and 1928.

Enter:

(Signed) EDGAR J. GOODRICH,
Member.

(Seal)

Entered Dec. 5, 1934.

15 UNITED STATES BOARD OF TAX APPEALS. Filed 1935

* * (Caption—58813) * *

MOTION FOR ADDITIONAL FINDINGS OF FACT AND TO MODIFY DECISION.

Filed Jan. 10, 1935.

Denied Jan. 26, 1935.

(Signed) EDGAR J. GOODRICH,
Member.

Now Comes the respondent, by and through his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and respectfully shows to this Honorable Board—

That the above-entitled appeal was heard at Chicago, Illinois, before Hon. Edgar J. Goodrich;

That the issue involved is—what was the fair market value as of March 1, 1913 of the grave plots sold by the petitioner during the years 1926, 1927 and 1928;

That on December 4, 1934 the Board promulgated its findings of fact and opinion and entered its decision that there are no deficiencies for the years 1926, 1927 and 1928 on December 5, 1934;

That Mr. Herbert W. Spencer, a witness on behalf of the petition, testified at the hearing as follows:

By Mr. Tonjes: Q. Mr. Spencer, how long do you estimate it would take the cemetery company to dispose of the lots, that is the improved portion of the cemetery?

A. Well, that is a hard question to answer, but I would say roughly 50 years, 60 years, maybe, the improved section. That is, when I say that, I do not mean that possibly every grave, but the bulk of it would be disposed of in 60 or 70 years.

16 Q. That is, you mean now, or 1913?

I mean from now. I think that is possibly too conservative. It might come nearer to 75 years; it would depend largely upon the growth of the community. Record 14.

Q. With reference to the probable length of time that would be required to dispose of all of the lots in the developed portion of the cemetery, you testified it would take over 50 years or 60 years; from 1934?

A. Yes, that would be my estimate; it is just an estimate.

It would depend largely upon the population of the surrounding communities, etc. Record 23 and 24.

Q. How were the lots sold? Did you have any agreement in 1913 to keep the cemetery in any particular degree of appearance?

A. Well, every lot and grave in the cemetery is under perpetual care, and when perpetual care is provided, it means keeping the roads and drives in proper repair, keeping the drainage system in proper repair, keeping fences in repair, cutting the grass, trimming the trees and shrubs, and keeping it in good condition generally.

Q. That system of selling lots was also in effect in 1913, was it?

A. Yes, ever since the organization.

Q. About how much does it cost to maintain the cemetery a year, that is the roads, the shrubbery, etc.?

A. Well, that is a little difficult to say, for the simple reason it costs more some years than it does others. For instance, in a certain year, you might have to do expensive repairs; you might have expense repairs to do in your drainage, at some time.

Q. What, to the best of your knowledge would be a fair estimate?

A. We got this in—the original 37 acres I would think it would cost around $8,000, $7,000, $8,000 or $9,000.

Q. I did not have in mind the total improvements, Mr. Spencer, I had in mind—

A. No, you mean operating costs.

Q. I mean yearly upkeep, just keeping the park, the burial park, in what we call a respectable condition, not the total outlay?

A. You do not mean labor, you mean for—just for the—

17 Q. Now, just the expenses for which you do not get any direct compensation.

A. $4,000, I would say it cost about $4,000.

Q. From 1913 to date?

A. Probably that.

Q. How much a year would you pay?

A. How is that?

Q. About how much per year?

A. I would say about $4,000 per year.

Q. I see.

A. You see, we cut the grass as high as 37 times in one sea-

son; in two years we cut the grass 37 times, but last year we only cut it 28 times because we had such a dry season. Record 14, 15 and 16.

Q. Mr. Spencer, the record shows that the average sales for the years 1909 to 1913 are slightly over 7,000 feet; based on that showing, what would you say would be a fair expectancy of sales of burial lots for 1913, the entire year, how many square feet would you reasonably expect to dispose of, based on what knowledge you had at the time?

* * * * * *

Q. Well, I would have been fairly satisfied if it had been 7,000 or 7,500. Record 18 and 19.

It is therefore, respectfully requested that the Board find the following additional facts, none of which were found by the Board in its finding of fact and opinion:

That—"It would take 75 years from March 1, 1913 for the petitioner to dispose of the lots in the improved portion of the cemetery."

That—"It would cost the petitioner approximately $4,000 a year to maintain the cemetery in a condition so as it would be suitable for burial purposes."

That—"Based on the information available at March 1, 1913 the petitioner had a fair expectancy of disposing of between 7,000 and 7,500 square feet of burial lots during the year 1913."

The respondent respectfully urges that the decision of
18 the Board to the effect that the burial lots sold by the petitioner during the taxable years had a value of 76.6 a square foot is erroneous, and in support thereof, submits the following:

That the Board has failed to take into consideration the fact that the petitioner had an expectancy of selling only 7,500 square feet of its property a year at March 1, 1913, and that it would take 75 years to dispose of the available burial lots in the improved portion of the cemetery. In other words, the Board has failed to take into consideration the fact that the average sale of undisposed lots of petitioner is approximately 37 years after March 1, 1913.

That the Board in the case of the Fairmount Cemetery Association, reported in 30 B. T. A. No. 114, lays down the rule to be applied in determining the fair market value as of March 1, 1913, of cemetery properties—

"* * * The meaning of fair market value is well fixed. It is what property can be sold for at a given date in a trans-

action in which vendor and vendee are equally free to act. It is true that petitioner has proved some sales of improved lots about two years before March 1, 1913, at prices approximating the values here claimed. The record discloses, however, that at the basic date the land owned by petitioner was sufficient to supply all its demands for burial lots for 200 years. The appraisal of 78 cents per square foot and the expert evidence offered in connection therewith by the petitioner ignores this situation. If it be assumed that all the lots on hand would be sold over a period of 200 years, it follows that on an average the receipt of the sales price by the petitioner would be deferred for 100 years. It would then become necessary to determine the present worth of $34,000, the value per acre claimed in 1913, but not realizable until 2013, which at a discount rate of 6 percent, would be $100.20".

That this appeal of the *Fairmount Cemetery Association,* reported in 30 B. T. A., clearly overrules the case of the *Fairmount Cemetery Association, reported in* 25 B. T. A. 1272, which is relied on by the Board as authority for its decision.

19 Wherefore, it is respectfully prayed that the Board find the additional facts set forth above, and that the Board modify its decision by giving consideration to these facts and to apply the method of determining the March 1, 1913 value of the cemetery lots in the manner consistent with the Appeal of Fairmount Cemetery Association, reported in 30 B. T. A. No. 114.

(Signed) ROBERT H. JACKSON,
Robert H. Jackson,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
E. A. TONJES,
Special Attorney, Bureau of Internal Revenue.

eat-k 1-8-35

20 UNITED STATES BOARD OF TAX APPEALS. Filed 1 1935

* * (Caption—58813) * *

MOTION TO HAVE ORDER DENYING MOTION FOR ADDITIONAL FINDINGS OF FACT AND TO MODIFY DECISION, REVIEWED BY THE FULL BOARD.

Filed February 5, 1935.

Now Comes the respondent, by and through his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and respectfully shows to this Honorable Board: That the above-entitled appeal was heard by the Honorable Edgar J. Goodrich, at Chicago, Illinois, on March 16, 1934. The question presented is, what was the fair market value as of March 1, 1913 of the grave lots sold by the petitioner during the years 1926, 1927 and 1928. On December 4, 1934, the Board promulgated its findings of fact and opinion. On December 5, 1934, it entered its order that there are no deficiencies for the years 1926, 1927 and 1928.

The Board found as a fact, and the respondent agrees, that the average sales of grave lots during the year just preceding March 1, 1913 was at a price of 76.6 a square foot. The Opinion of the Board reads in part as follows:

"We are of the opinion that the valuation for which petitioner contends is reasonable and should be allowed. It is based upon actual sales, and consequently comes as closely as may be to that fair market value, so often judicially
21 defined as the price which property will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell. S. M. 1428, C. B. IV—I-101; *Fairmount Cemetery Association*, 25 B. T. A. 1272."

It will be noted that the Board bases its opinion on the case of the Fairmount Cemetery Association, 25 B. T. A. 1272. However, in a more recent case of the Fairmount Cemetery Association, which is reported in 30 B. T. A. #114, the Board lays down a different rule than that used in the case reported in 25 B. T. A., to be applied in determining the fair market value of cemetery properties as of March 1, 1913.

The Board in the latter case, said:

"* * * The meaning of fair market value is well fixed. It is what property can be sold for at a given date in a transaction in which vendor and vendee are equally free to act. It is true that petitioner has proved some sales of improved lots about two years before March 1, 1913, at prices approximating the values here claimed. The record discloses, how-

ever, that at the basic date the land owned by petitioner was sufficient to supply all its demands for burial lots for 200 years. The appraisal of 78 cents per square foot and the expert evidence offered in connection therewith by the petitioner ignores this situation. If it be assumed that all the lots on hand would be sold over a period of 200 years, it follows that on an average the receipt of the sales price by the petitioner would be deferred for 100 years. It would then become necessary to determine the present worth of $34,000, the value per acre claimed in 1913, but not realizable until 2013, which at a discount rate of 6 per cent, would be $100.20".

Based on the rule laid down by this decision, clearly the number of years it will require the cemetery to dispose of all of the burial lots in the property to be valued is material to the question of what the value of such property is, and
22 therefore it is the respondent's contention that if the evidence shows what this period of time is, the Board is bound to find what it is as a fact.

The Board in its findings of fact and opinion makes no such finding, and in order to correct this omission, respondent on January 10, 1935, filed a motion with the Board praying that the Board find additional facts and that its decision be modified. In this motion the respondent sets forth testimony upon which he relies in support of the motion. The motion, however, was denied by the Member who rendered the opinion, without comment.

The testimony quoted unquestionably establishes the fact that it would take 75 years from March 1, 1913 for the cemetery to sell all of its burial lots and that based on the information available at March 1, 1913, the petitioner had an expectancy of disposing of between 7,000 and 7,500 square feet of burial lots during the year 1913. In other words, the evidence shows that the market is limited and that the petitioner could not sell all of its lots at the price some were sold.

Based on the decision of the Board in the case of *Fairmont Cemetery Association,* 30 B. T. A. #114, the Board itself puts the stamp of materiality on the fact that a cemetery company cannot dispose of all of its burial lots immediately, but that it would take a number of years to do so. The evidence in the record on this point is uncontradicted. The only witness on behalf of the petitioner testified both on cross-examination and redirect examination that it would take the
23 petitioner 75 years from March 1, 1913, to sell all of its burial lots. Why the motion of the respondent, asking the Board to find facts which the record unquestionably establishes, and which the Board itself has found to be material

in determining the value of this type of property, was denied, is difficult to understand.

The question here to be decided is what is the fair market value of the cemetery lots which the petitioner sold during the taxable years. Clearly, the market value means what a thing can be sold for, and when, as in this case, the testimony clearly shows that the market is not a present market, but a market in the mean 37 years hence, the fact that the market is 37 years hence is material and the Board should find so as a fact.

A view of the case as a whole shows the absuridity of the Board's determination of the value. The property acquired in 1909 cost, together with improvements, less than $1,500 an acre. The Board's value, however, as of March 1, 1913, less than five years from its acquisition, is in excess of $30,000 an acre.

The testimony that all the lots could not be sold for 75 years came from the petitioner's witness—but surely this does not mean that it is to be ignored if it is not to the petitioner's benefit. *L. Schepp,* 25 B. T. A. 419. There is nothing equivocal or ambiguous about the testimony. The witness was president of the petitioner and certainly was qualified to testify.

24 In conclusion, the respondent submits that the record contains conclusive evidence proving that the cemetery property would not be sold for 75 years from March 1, 1913; that it is material to the determination of the value of the lots in question to find as a fact over how long a period such lots will be sold, that the decision upon which the Board relies to support its opinion has been overruled; that the contentions of the respondent are in harmony with the last word on the subject by the Board (*Fairmont Cemetery Association,* 30 B. T. A. #114), and accordingly the respondent's motion for a further finding of fact and modification of the opinion and decision of the Board, should be reviewed by the full Board.

Wherefore, it is prayed that this motion be granted, and the motion filed by respondent on January 10, 1935, be allowed.

(Signed) ROBERT H. JACKSON
Robert H. Jackson,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
E. A. TONJES,
Special Attorney,
Bureau of Internal Revenue.

eat-k 1-31-35

Feb. 9. 25 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—58813) * *

ORDER DENYING BOARD REVIEW.

On December 4, 1934, the Board entered it memorandum opinion in this proceeding and on December 5, 1934, entered a decision in pursuance thereof deciding that there are no deficiencies for the years 1926, 1927, and 1928.

On January 10, 1935, respondent filed "Motion for Additional Findings of Fact and to Modify Decision." This motion was denied on January 26, 1935, by the Division Member who entered the memorandum opinion and decision above referred to.

On February 5, 1935, respondent filed "Motion to Have Order Denying Motion for Additional Finding of Fact and to Modify Decision, Reviewed by the Full Board," which motion has come to the Chairman for consideration.

Only Division reports which form the basis for the entry of the final decision in the proceedings are referred to the full Board of review under the rules of the Board and the applicable statutes. Such a report was the memorandum opinion entered by Division Member Goodrich, December 4, 1934. Orders by Division Members on motions such as respondent's "Motion for Additional Findings of Fact and to Modify Decision" are not under the rules of the Board and the applicable statutes, referred to the full Board for review. The Chairman's authority to refer reports of Divisions of the Board to the full Board for review is found in section 906 (b) of the Revenue Act of 1924 as amended in section 601 of the Revenue Act of 1928, which section 906 (b) as amended, reads as follows:

26 "(b) The report of the division shall become the report of the Board within 30 days after such report by the division, unless within such period the chairman has directed that such report shall be reviewed by the Board. Any preliminary action by a division which does not form the basis for the entry of the final decision shall not be subject to review by the Board except in accordance with such rules as the Board may prescribe. The report of a division shall not be a part of the record in any case in which the chairman directs that such report shall be reviewed by the Board."

Accordingly, respondent's "Motion to Have Order Deny-

ing Motion for Additional Findings of Fact and to Modify Decision, Reviewed by the Full Board" is hereby Denied.

(Signed) EUGENE BLACK,
Chairman.

Dated: Washington, D. C., February 9, 1935.

33 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—58813) * *

NOTICE OF FILING PETITION FOR REVIEW.

Filed Mar. 16, 1935.

United States Board of Tax Appeals.

Elmhurst Cemetery Company,
East Washington Street,
Joliet, Illinois.

You are hereby notified that the Commissioner of Internal Revenue, did, on the 2nd day of March, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 5th day of March, 1935.

(Sgd) GEO. WARNER YOUNG,
Respondent on Review.

34 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.
* * (Caption—58813) * *

NOTICE OF FILING PETITION FOR REVIEW.

Filed Mar. 16, 1935.

United States Board of Tax Appeals.

J. F. Riordan, Esq.,
134 South La Salle Street,
Chicago, Illinois.

You are hereby notified that the Commissioner of Internal Revenue, did, on the 2nd day of March, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Seventh Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 4th day of March, 1935.

(Sgd) J. F. RIORDAN,
Attorney for the Respondent on Review.

27 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.
* * (Caption—58813) * *

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

Filed Mar. 2, 1935.

United States Board of Tax Appeals.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant At-

torney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and E. A. Tonjes, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

The petitioner on review (hereinafter referred to as the Commissioner), is duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The respondent on review (hereinafter referred to as the taxpayer) is a corporation organized and existing under the laws of the State of Illinois, and has its principal office on East Washington Street, Joliet, Illinois, and filed its income tax returns for the years 1926, 1927 and 1928 with the Collector of Internal Revenue for the First Illinois District, which said collection district is located within the Seventh Judicial Circuit of the United States.

28 II.

The nature of the controversy is as follows:

The petitioner in 1909 purchased approximately 137 acres of land near Joliet, Illinois, which was all dedicated to cemetery purposes and since then operated as a cemetery. 37 acres of the 137 acres were developed and made suitable for burial purposes by landscaping, laying of roads, constructing pools and leveling.

During the years 1926, 1927 and 1928, the petitioner sold 14,939, 10,979 and 17,077 square feet respectively, of its property for burial lots.

The Commissioner in determining the income tax liability of the taxpayer for the years 1926, 1927 and 1928, used as a basis for determining the gain on such sales of burial lots, a March 1, 1913 value of ~~14.4~~ cents a square foot, and by a notice of deficiency dated April 30, 1931, proposed for assessment deficiencies in income tax for the respective years, the amounts of $1177.32, $344.43, and $1172.55. From this determination of the Commissioner, the taxpayer appealed to the United States Board of Tax Appeals, contending that the fair market value at March 1, 1913, of the improved portion of the cemetery was 76.6 cents a square foot.

The appeal was heard at Chicago, Illinois, on March 16, 1934. It was established at the hearing that the average sell-

ing price of the grave lots sold during the four years preceding March 1, 1913 was 76.6 cents a square fot. The Board found this to be the fair market value to be used as a basis
for determining the gain on the sales of burial lots made
29 by the taxpayer during the years in question, and on
December 5, 1934, ordered and decided that there are no deficiencies for the years 1926, 1927 and 1928.

The record also contains uncontradicted testimony that based on the information available at March 1, 1913, the taxpayer had an expectancy of disposing of 7,000 to 7,500 square feet of burial lots during the year 1913, and that it would take the taxpayer 75 years from March 1, 1913, to dispose of all of its burial lots in the improved portion of the cemetery. The Board of Tax Appeals in its Memorandum Opinion dated December 4, 1934, failed to find either of these facts. Thereafter, the Commissioner filed a motion with the Board requesting the Board to find such additional facts, which motion was denied by the Board of Tax Appeals on January 26, 1935.

III.

The Commissioner now says that in the record and proceedings before the United States Board of Tax Appeals and in the findings of fact, opinion and decision promulgated and entered by said Board, manifest error occurred and intervened to the prejudice of the Commissioner, and the Commissioner says the following errors and each of them, which he avers occurred in said record, proceedings, findings of fact, opinion and decision, upon which he relies to reverse the said findings of fact, opinion and decision so rendered and entered by the United States Board of Tax Appeals, to wit:
by the United States Board of Tax Appeals, to wit:
30 1. The Board of Tax Appeals erred in not holding and deciding that the fair market value at March 1, 1913, of the grave lots sold by the taxpayer during the taxable years 1926, 1927 and 1928 was ~~14.4~~ 23.96 cents a square foot.

2. The Board of Tax Appeals erred in holding and deciding that the fair market value at March 1, 1913 of the grave lots sold by the taxpayer during the taxable years 1926, 1927 and 1928 was 76.6 cents a square foot.

3. The Board of Tax Appeals erred in failing to find as a fact that based on the information available at March 1, 1913, the taxpayer had an expectancy of disposing of between 7,000 and 7,500 square feet of burial lots during the year 1913.

4. The Board of Tax Appeals erred in failing to find as a fact that it would take the taxpayer 75 years from March 1, 1913, to dispose of all of its burial lots in the improved portion of the cemetery.

5. The findings, determination and decision of the Board of Tax Appeals are contrary to the evidence.

6. The findings, determination and decision of the Board of Tax Appeals are not in accordance with the weight of the evidence.

7. The Board of Tax Appeals erred in not rendering judgment for the Commissioner in the amount of the deficiency for each of the taxable years involved for the reason that any other judgment is not supported by competent and substantial evidence nor according to law.

31 Whereupon, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Seventh Circuit, that a transcript of record be prepared in accordance with law and with the rules of said Court and transmitted to the clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) FRANK J. WIDEMAN,
Assistant Attorney General.
(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
E. A. TONJES,
Special Attorney,
Bureau of Internal Revenue.

32 United States of America, }
District of Columbia. } ss.

E. A. TONJES, being duly sworn, says that he is a Special Attorney in the Office of the Assistant General Counsel for the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd) E. A. TONJES,

Sworn and subscribed to before me this first day of March, 1935.

My commission expires Nov. 16, 1937.

(Sgd) GEORGE W. KREIS,
Notary Public.

pr. 12, 48 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—58813) * *

ORDER ENLARGING TIME.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Seventh Circuit, be and it is hereby extended to July 2 1935.

(Signed) EUGENE BLACK,
Member.

Now Sept. 3 1935, the foregoing is certified from the record as a true copy.

B. D. GAMBLE,
(Seal) *Clerk, U. S. Board of Tax Appeals.*

Dated, Washington, D. C., April 12, 1935.

une 20, 47 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—58813) * *

ORDER ENLARGING TIME.

On motion of counsel for the petitioner, it is

Ordered: That the time for preparation of the evidence and transmission and delivery of the record sur petition for review of the above entitled proceeding by the United States Circuit Court of Appeals, Seventh Circuit, be and it is hereby extended to September 3, 1935.

(Signed) EUGENE BLACK,
Member.

Now Sept. 3 1935, the foregoing is certified from the record as a true copy.

B. D. GAMBLE,
(Seal) *Clerk, U. S. Board of Tax Appeals.*

Dated: Wash. D. C., June 20, 1935.

46 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—58813) * *

ORDER ENLARGING TIME.

For cause appearing of record, it is

Ordered: That the time for transmission and delivery of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Seventh Circuit, be and it is hereby extended to Sept. 9, 1935.

(Signed) EUGENE BLACK,
Member.

Now Sept. 3 1935, the foregoing is certified from the record as a true copy.

B. D. GAMBLE,
(Seal) *Clerk, U. S. Board of Tax Appeals.*

Dated: Washington, D. C., Aug. 31, 1935.

43 IN THE UNITED STATES CIRCUIT COURT OF APPEALS. Filed A 1935.

* * (Caption—58813) * *

PRAECIPE OF RECORD.

Filed Aug. 19, 1935.

United States Board of Tax Appeals.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, copies duly certified as correct of the following documents and records in the above-entitle cause in connection with the petition for review by the said Circuit Court of Appeals for the Seventh Circuit, heretofore filed by the Commissioner of Internal Revenue.

1. Docket series of the proceedings before the Board.
2. (a) Petition.
(b) Answer.
(c) Motion for Additional Findings of fact and to Modify Decision.
(d) Motion to Have Order Denying Motion for Additional

Findings of Fact and to Modify Decision, Reviewed by the Full Board.

(e) Order Denying Board Review.

3. Copy of Notice of Deficiency filed at hearing.

4. Memorandum opinion and decision.

5. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

44 6. Statement of the evidence as settled and allowed.

7. Orders enlarging time for the preparation of the evidence and for the transmittal and delivery of the record.

8. This praecipe.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 17th day of August, 1935.

(Sgd) LAWRENCE GROVES,
Attorney for Respondent.

45 UNITED STATES BOARD OF TAX APPEALS.

* * (Caption—58813) * *

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 44, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 3rd day of Sept., 1935.

B. D. GAMBLE,
(Seal) *Clerk, United States Board of Tax Appeals.*

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 34, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the twenty-sixth day of September, 1935, upon which the following entitled cause was heard and determined:

Commissioner of Internal Revenue,
Petitioner,

vs.

The Elmhurst Cemetery Company of Joliet,
Respondent.

No. 5617, October Term, 1935, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 11th day of June, A. D. 1936.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court, in the City of Chicago, in said Seventh Circuit, on the first day of October, 1935, of the October Term, in the year of our Lord one thousand nine hundred and thirty-five, and of our Independence the one hundred and sixtieth.

Commissioner of Internal Revenue,
Petitioner,
5617 *vs.*
The Elmhurst Cemetery Company of Joliet,
Respondent.

Petition for Review of Decision of the United States Board of Tax Appeals.

And afterwards, to-wit: On the fourteenth day of February, 1936, the following further proceedings were had and entered of record, to-wit:

Friday, February 14, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Philip L. Sullivan, District Judge.

Commissioner of Internal Revenue,
5617 *vs.*
The Elmhurst Cemetery Company of Joliet.

Petition for Review of Decision of the United States Board of Tax Appeals.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral argument by Mr. Howard P. Locke, counsel for petitioner, and by Mr. Elden McFarland, counsel for respondent, and the court having heard the same, takes this matter under advisement.

And afterwards, to-wit: On the seventeenth day of March, 1936, there was filed in the office of the Clerk of this court, the Opinion of the court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 5617. OCTOBER TERM, 1935, JANUARY SESSION, 1936.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,
vs.
THE ELMHURST CEMETERY COMPANY OF JOLIET,
Respondent.

Petition for Review of Decision of United States Board of Tax Appeals.

March 17, 1936.

Before EVANS and SPARKS, *Circuit Judges*, and SULLIVAN, *District Judge*.

This appeal involves respondent's income taxes for the years 1926, 1927, and 1928. Controversy is over the value of vacant cemetery lots on March 1, 1913. The Commissioner fixed the value at 23.96 cents per square foot. The taxpayer appealed, and the Board of Tax Appeals determined the value at 76.6 cents per square foot. The Commissioner appealed.

EVANS, *Circuit Judge*. Does the evidence support the finding of the Board of Tax Appeals that lots in respondent's cemetery were worth 76.6 cents per square foot on March 1, 1913? If so, we must affirm.

The facts. Appellant was organized in 1909. It purchased 137 acres of land near Joliet for $60,000 and improved 37

acres of it at a cost of $35,000. From this improved acreage it sold lots as follows:

1909	7,308.55 sq. ft. at 73c	per sq. ft.
1910	7,005.55 sq. ft. at 71.5c	per sq. ft.
1911	7,312.20 sq. ft. at 70.2c	per sq. ft.
1912	6,320.20 sq. ft. at 77.6c	per sq. ft.
1913	8,506.10 sq. ft. at 79.5c	per sq. ft.
Total	36,452.60 sq. ft. at 74.36c	per sq. ft.

The superintendent of respondent was the only witness. All other facts were stipulated. The superintendent estimated that it would take seventy-five years to dispose of all of the property as and for cemetery lots. He testified the average price at which lots were sold the year immediately preceding March 1, 1913, was 76.6 cents per square foot. In the years 1926, 1927, and 1928, the footage sold and prices received were as follows:

1926	14,939.9 sq. ft. at	$1.55
1927	10,979 sq. ft. at	1.66
1928	17,077.5 sq. ft. at	1.77

The Board accepted the selling price of lots for the year previous as the basis of its determination of fair value. Petitioner urges that such selling price should be discounted because of the years required to dispose of the entire tract.

While selling price is often a satisfactory way of determining value, it is not always so. *Heiner* v. *Crosby*, 24 F. (2d) 191 (CCA 3d); *Chicago Ry. Equipment Co.* v. *Blair*, 20 F. (2d) 10, 13 (CCA 7th). A purchaser of an unimproved quarter section of land in Northern Wisconsin, for example, might have 200,000 evergreen trees suitable for Christmas use on his tract, and his offer to sell them to whomsoever would come and cut and carry them away for 25 cents each was accepted by one hundred persons in a single year. It would hardly be claimed that the 200,000 trees as they stood on the land were worth $50,000, especially if it be shown that the land was purchased the year before at $10 per acre.

The land here in question cost respondent $440 per acre in 1909. The Board, four years later, in 1913, fixed its value at $32,000 per acre. Differently stated, the cost price in 1909 was 1.1 cents per square foot. Its value in 1913 was fixed at 76.6 cents per square foot. The extraordinary rise must have been due solely to the change in its use for there was no evidence of rise in the value of land around Joliet from 1909 to 1913.

To emphasize the weakness of selling price in certain cases,

take another illustration. Assume the change from farm acreage to cemetery lots occurred January 1, 1913, and 5,000 square feet of lots had been sold at 76 cents per square foot during the two months following organization. Assume further that the cost on January 1 was one cent per square foot. Would the lot selling price completely overcome the evidence furnished by the purchase price three months earlier?

We think the facts in this case necessitate the rejection of the selling price as the sole determinator of value. Far more equitable is the selling price less discount for years required to realize said selling price. We do not say that in all cases and under all circumstances such basis should be used in determining the 1913 value of cemetery lots. Various factors, such as age of cemetery, location, the existence of other cemeteries, and cemetery sites and many other matters, should be considered. An impartial view would be, we think, that the selling price of a few lots would have to give way before the more satisfactory evidence of cost price.

The statute provided that the cost of the property or "the fair market value of such property as of March 1, 1913, whichever is greater" shall be used in determining income. The Commissioner did not limit the taxpayer to cost price but fixed a market value well in excess of that figure. The burden was upon respondent to show this valuation was not only incorrect, but to present some evidence to support the higher figure. This burden has not been overcome in the case before us.

Our conclusion is that the Commissioner was liberal with the taxpayer. It should be noted that fair market value is the alternative to cost price. If the circumstances make evidence of fair market value impossible or not obtainable or so uncertain and unsatisfactory as to render any finding thereon purely speculative, then the cost price must be used. Obviously, the respondent cannot complain when the Commissioner, under such circumstances, fixes a valuation which is much higher than cost price.

The order of the Board of Tax Appeals is reversed with directions to affirm the determination of the Commissioner.

Endorsed: Filed April 1, 1936. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the seventeenth day of March, 1936, the following further proceedings were had and entered of record, to-wit:

Tuesday, March 17, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Philip L. Sullivan, District Judge.

Commissioner of Internal Revenue,
5617 *vs.*
The Elmhurst Cemetery Company of Joliet.

Petition for Review of Decision of the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On Consideration Whereof: It is now here ordered and adjudged by this court that the Decision entered in this cause on December 5, 1934, by the United States Board of Tax Appeals be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said United States Board of Tax Appeals with directions to affirm the determination of the Commissioner.

And afterwards, to-wit: On the sixth day of April, 1936, there was filed in the Office of the Clerk of this court, a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

And afterwards, to-wit: On the fifteenth day of April, 1936, there was filed in the office of the Clerk of this court, an Answer to the Petition for a Rehearing, which said Answer is not copied here.

And afterwards, to-wit: On twenty-first day of May, 1936, the following further proceedings were had and entered of record, to-wit:

Thursday, May 21, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Philip L. Sullivan, District Judge.

Commissioner of Internal Revenue,
5617 *vs.*
The Elmhurst Cemetery Company of Joliet.

Petition for Review of Decision of the United States Board of Tax Appeals.

It is ordered by the court that the Petition for a Rehearing in this cause be, and the same is hereby denied.

And afterwards, to-wit: On the twenty-eighth day of May, 1936, the following further proceedings were had and entered of record, to-wit:

Thursday, May 28, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

Commissioner of Internal Revenue,
5617 *vs.*
The Elmhurst Cemetery Company of Joliet.

Petition for Review of Decision of the United States Board of Tax Appeals.

Now this day comes counsel for respondent and presents a motion to stay the Mandate of this court pending a petition to the Supreme Court of the United States for a writ of certiorari.

On Consideration Whereof: It is now here ordered that

the Mandate in this cause be, and the same is hereby stayed until the further order of this court.

It is further ordered that counsel for respondent proceed with diligence and promptly file the petition for a writ of certiorari in the Supreme Court of the United States, and forthwith file in this court proof of the filing of said petition in said court.

And on the same day, to-wit: On the twenty-eighth day of May, 1936, there was filed in the office of the Clerk of this court, a Praecipe for Record, which said Praecipe is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Commissioner of Internal Revenue,
Petitioner,
vs.
The Elmhurst Cemetery Company of Joliet,
Respondent.
No. 5617.

PRAECIPE FOR RECORD.

To the Clerk of the U. S. Circuit Court of Appeals for the Seventh Circuit:

Will you please prepare a certified transcript of the record in the above-entitled cause together with copies thereof for filing with the Clerk of the Supreme Court of the United States, in connection with respondent's petition for certiorari, including therein:

1. The record before the above-entitled Court on petition for review.

2. The following proceedings before said United States Circuit Court of Appeals for the Seventh Circuit:

(a) Reference to argument and submission;
(b) Opinion;
(c) Judgment;
(d) Reference to filing petition for rehearing;
(e) Reference to filing answer to petition for rehearing;

(f) Order denying rehearing;
(g) Order staying mandate.

ELDEN MCFARLAND,
Attorney for Respondent.

The foregoing praecipe is satisfactory to the petitioner.

ROBERT H. JACKSON,
Assistant Attorney General,
Attorney for Petitioner.

Endorsed: Filed May 28, 1936. Frederick G. Campbell, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 37 to 44, inclusive, contain a true copy of the proceedings had and papers filed, made in accordance with the Praecipe filed on the twenty-eighth day of May, 1936, (excepting Item I of said Praecipe, being the printed record, which is certified under a separate certificate); in the case of

Commissioner of Internal Revenue,
Petitioner,

vs.

The Elmhurst Cemetery Company of Joliet,
Respondent.

No. 5617, October Term, 1935, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 11th day of June, A. D. 1936.

FREDERICK G. CAMPBELL,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. [redacted]255

FILED
AUG 3 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1936.

THE ELMHURST CEMETERY COMPANY OF JOLIET, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and Brief in Support Thereof.

ELDEN MCFARLAND,
618 Southern Building,
Washington, D. C.,
Attorney for Petitioner.

Of Counsel:
EDWARD J. QUINN,
J. F. RIORDAN,
134 South LaSalle Street,
Chicago, Illinois.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

October Term, 1936.

THE ELMHURST CEMETERY COMPANY OF JOLIET, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and Brief in Support Thereof.

May it Please the Court:

The petitioner, The Elmhurst Cemetery Company of Joliet, by Elden McFarland, its attorney, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit (R. 41) reversing the order of the United States Board of Tax Appeals (R. 18), and the order of that court denying a Petition for Rehearing (R. 42).

SUMMARY STATEMENT OF MATTER INVOLVED.

This case involves the determination of the basis for computing gain upon the sale of cemetery burial lots acquired as acreage in 1909 and sold as burial lots in 1926, 1927 and 1928. In its income tax return petitioner computed its profit on the basis of a March 1, 1913 value of 76.6 cents per square foot (R. 16). The respondent determined that the lots had a fair market value as of March 1, 1913 of 23.96 cents per square foot (R. 6), which was in excess of

the cost (R. 11). The petitioner filed with the United States Board of Tax Appeals a petition for redetermination of the resulting proposed deficiency. The case was heard; and the Board found a value of 76.6 cents per square foot, based on average selling price of lots in the same cemetery for the year ended March 1, 1913 (R. 18), together with evidence that the reasonable expectation was that the values of the lots would increase from year to year (R. 12, 14). The Circuit Court of Appeals reversed the Board, holding that the actual sales prices of such lots in 1913 was not a satisfactory method of determining value (R. 39, 40); that a discount method of valuation was more equitable (R. 40); that the evidence of such sales was not evidence of value; and that there was no evidence to support the Board's finding of value (R. 40). It thereupon reversed the Board, holding that the petitioner had not overcome the presumption of correctness of the respondent's determination.

The undisputed facts are as follows: In 1909 petitioner acquired 137 acres of land near Joliet, Illinois, at a cost of $60,000 (R. 11). Between 1909 and March 1, 1913 it developed the north 37 acres for cemetery purposes. The development consisted of construction of roads, drives, pools, leveling and grading, landscaping, planting of flowers, trees and shrubs, construction of buildings and fences (R. 11, 17, 5), at a cost of $35,000 (R. 17). From the acreage so improved, its sales of grave plots have since been made.

Sales each year from 1909 to 1918 were as follows:

1909	7308	sq. ft. @	73¢
1910	7005.55	" " @	71.5¢
1911	7312.20	" " @	70.2¢
1912	6320.20	" " @	77.6¢
1913	8506.10	" " @	79.5¢
1913—month of March	312	" " @	78.08¢
1914	—		75.6¢
1915	—		78.1¢
1916	—		80¢

Sales for 1926, 1927 and 1928 were:

1926	14,939.9 sq. ft.	@ $1.55
1927	10,979 " "	@ $1.66
1928	17,077.5 " "	@ $1.77

(R. 12, 17).

The average sale price of lots sold in the improved area from March 1, 1912 to March 1, 1913 was 76.6 cents per square foot (R. 15).

Inasmuch as the experience of cemeteries is that as more lots are sold the remaining lots become increasingly valuable (R. 12), and that as a general rule for every head of a family buried, four new families purchase burial lots, petitioner in 1913 expected a gradual increase in sales price per square foot each year (R. 14). Although the average annual expense for taking care of the grounds was about $4,000 there was incidental income from interments, planting flowers, care of flowers and sales of flowers to offset that expense (R. 14).

Counsel for the Government stated that the Government engineer arrived at his valuation by discounting cost over the prospective time of sale to reduce it to a present value, using the discount method of arriving at a valuation (R. 15). Beyond the statements of counsel that the respondent valued the land by formula, there is no evidence of the method by which he chose the figures at which he fixed the basis for determining gain (R. 17).

It would take from 50 to 75 years to sell all of the lots in the improved section (R. 13).

The respondent offered no evidence at the hearing (R. 15).

The Board accepted average selling price of similar lots as a basis for the March 1, 1913 value. The Circuit Court of Appeals held that the Board erred in taking such selling price as the basis of value and held that "selling price less discount for the years required to realize the selling price" was a "far more equitable" basis (R. 40).

The court further held that "the selling price of a few lots would have to give way before the more satisfactory evidence of cost price" (R. 40).

The court also said: "The burden was upon respondent to show this valuation (by the Commissioner) was not only incorrect, but to present some evidence to support the higher figure. This burden has not been overcome in the case before us" (R. 40). And accordingly it reversed the Board.

B.

REASONS RELIED ON FOR GRANTING THE WRIT.

1. The Circuit Court of Appeals for the Seventh Circuit has decided a federal question in a way probably not in accord with applicable decisions of this Court.

(a) In reversing the Board of Tax Appeals it has passed upon the weight of evidence and has substituted its judgment for that of the trial tribunal, contrary to the rule stated by this Court in *McCaughn* v. *Real Estate Land, Title and Trust Company, et al.*, 297 U. S. ——, 56 S. Ct. 604, 80 L. Ed. 619. Cf. *Helvering* v. *Rankin*, 295 U. S. 123, 55 S. Ct. 732, 79 L. Ed. 1343, and *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200, 56 S. Ct. 185, 80 L. Ed. 174.

(b) It has held that the presumption of correctness of the respondent's determination as to a question of fact continued in and was determinative of the case, where the record shows that petitioner produced substantial evidence controverting such determination. The effect of such holding is contrary to the rule announced in *Del Vecchio* v. *Bowers*, 296 U. S. 280, 56 S. Ct. 190, 80 L. Ed. 163, that a presumption continues in a case only so long as no material evidence in respect thereof is produced.

2. The Circuit Court of Appeals for the Seventh Circuit has rendered a decision the effect of which is in conflict with that of the United States Court of Appeals for the

District of Columbia in the case of *Fairmount Cemetery Association* v. *Helvering*, 79 Fed. (2d) 163, in the following particulars:

(a) The latter court held that where the Commissioner's valuation of cemetery lots is shown to be mere guesswork, the presumption in favor of the Commissioner's finding must yield to undisputed evidence of value contradictory to such finding.

(b) The latter court further held that if the time element (discount method) is to be used as a factor in determining the valuation of cemetery lots, it should be applied to the *particular lots involved* and not to the entire acreage.

The Circuit Court of Appeals for the Seventh Circuit held in the instant case that as a matter of law the time element (discount method) when applied to the *entire acreage* was an equitable method of determining value of the particular lots involved.

3. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of federal law which has not been but should be settled by this Court, *i. e.*, it has decided that the respondent's method of discounting the current March 1, 1913 sales price of cemetery lots as a basis for determining fair market value of lots on March 1, 1913, is a far more equitable method of determining the value on that date of lots subsequently sold, than the method of establishing the value on that date by reference to sales price of similar lots.

This principle affects directly the taxable gain for each year of every active cemetery in the United States which was established prior to March 1, 1913. Petitioner is informed that more than one hundred cases involving this principle of the discount method of valuation of cemetery lots are now pending in the Treasury Department.

WHEREFORE, your petitioner respectfully prays that this Honorable Court duly issue its writ of certiorari, directed

to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this Honorable Court for its review and determination, on a day certain to be therein named, the full and complete transcript of the record and all proceedings in this case; and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court; and that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

August 3, 1936.

THE ELMHURST CEMETERY COMPANY OF JOLIET,

By: ELDEN MCFARLAND,
618 Southern Building,
Washington, D. C.
Attorney for Petitioner.

Of Counsel:

EDWARD J. QUINN,
J. F. RIORDAN,
134 South LaSalle Street,
Chicago, Illinois.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the United States Board of Tax Appeals in this case is not reported. It is set forth in the record at page 16. The opinion of the United States Circuit Court of Appeals is reported at 83 Fed. (2d) 4 (R. 38).

II.

JURISDICTION.

This Court has jurisdiction to review the judgments below under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, 938. The judgments sought to be reviewed were entered March 17, 1936, and May 21, 1936 (R. 41, 42).

III.

STATUTES INVOLVED.

The applicable statutes are Sec. 204 (b) of the Revenue Act of 1926, C. 27, 44 Stat. 9, 16 and Sec. 113 (b) of the Revenue Act of 1928, C. 852, 45 Stat. 791, 821, which are practically identical in wording and read as follows:

> "The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property * * * or, (B) the fair market value of such property as of March 1, 1913, whichever is greater."

IV.

STATEMENT OF THE CASE.

The facts are stated in the accompanying petition for certiorari.

V.

SPECIFICATION OF ERRORS.

1. The United States Circuit Court of Appeals for the Seventh Circuit erred in holding and deciding that there was no evidence to support the Board's finding of fair market value of the properties involved, as of March 1, 1913.

2. The said court erred in holding and deciding that evidence of sales of similar properties made at or about March 1, 1913, was not evidence of fair market value as of March 1, 1913, of the properties involved.

3. The said court erred in holding and deciding that the presumption of correctness of the respondent's determination of value continued in the case after the petitioner produced substantial uncontroverted evidence in conflict with such determination.

4. The said court erred in weighing the evidence and in substituting its own judgment as to the weight thereof for that of the Board.

5. The said court erred in holding and deciding that where the prospective future selling price of property is greater than the present selling price thereof the present fair market value may be determined by discounting the present selling price over the period of years intervening until the probable time of sale.

6. The said court erred in not holding and deciding that if the discount method of valuation is to be applied, it should be applied to the particular lots involved and not to the entire acreage.

7. The said court erred in not holding and deciding that if the discount method of valuation is to be applied, it should be applied in reducing the probable ultimate sales price to a present worth.

8. The said court erred in assuming, contrary to the uncontroverted facts, that the sales price reasonably to be expected in the future was as of March 1, 1913, the same as the sales price as shown by the then current sales.

9. The said court erred in holding and deciding that the cost of the property purchased as acreage in 1909 was satisfactory evidence of the fair market value as of March 1, 1913, of the cemetery lots sold in 1926, 1927 and 1928.

10. The said court erred in not granting petitioner's motion for rehearing.

VI.

ARGUMENT.

(1) In reversing the Board the Circuit Court of Appeals erroneously passed upon the weight of evidence and made findings of fact, substituting its judgment for that of the Board.

Findings of the Board of Tax Appeals on issues of fact should be accepted by the court as conclusive if the evidence was legally sufficient to sustain them and if there was no irregularity in the proceedings. *Phillips* v. *Commissioner of Internal Revenue,* 283 U. S. 589, 600, 51 S. Ct. 608, 613, 75 L. Ed. 1289, 1299.

In the instant case the Board found that the fair market value as of March 1, 1913, of the cemetery lots sold in 1926, 1927 and 1928 was 76.6 cents per square foot (R. 18). That finding was supported (a) by evidence of the sales price of lots in the same part of the same cemetery as of March 1, 1913 (R. 17, 18, 12, 13); (b) by the statement of the sole witness, Herbert W. Spencer, that he, personally, had sold most of the lots, that he fixed the sales price by visiting a good many other cemeteries (R. 13), and that he arrived at a value of 76.6 cents per square foot as of March 1, 1913, by taking the average value of lots sold from March 1, 1912 to March 1, 1913 (R. 15); and (c) by the fact that the actual selling price of $1.55, $1.66 and $1.77 per square foot in

1926, 1927 and 1928 (R. 12) is corroborative of the 1913 value found by the Board. These latter sums if discounted at 6 per cent compounded annually will approximate the value of 76.6 cents per square foot found by the Board.

There is, therefore, substantial evidence to support the Board's finding. And the Board was satisfied that such value was "reasonable and should be allowed" (R. 18).

The appellate court, however, was not satisfied with the Board's judgment, for it said, reversing the Board:

> "While selling price is often a satisfactory way of determining value it is not always so"; and
>
> "We think the facts in this case necessitate the rejection of the selling price as the sole determinator of value"; and
>
> "Far more equitable is the selling price less discount for years required to realize said selling price"; and
>
> "* * * we think that the selling price of a few lots would have to give way before the more satisfactory evidence of cost price."

Without dwelling upon the fallacies of the court's reasoning, the fact remains that whether the court's reasoning was sound or unsound, it did substitute its own judgment for that of the Board as to questions of fact. Such action, in the face of the material evidence supporting the Board's finding of value, was erroneous. *McCaughn* v. *Real Estate Land, Title and Trust Company, et al.*, 297 U. S. ——, 56 S. Ct. 604, 80 L. Ed. 619; *Helvering* v. *Rankin*, 295 U. S. 123, 55 S. Ct. 732, 79 L. Ed. 1343; *General Utilities Operating Co.* v. *Helvering*, 296 U. S. 200, 56 S. Ct. 185, 80 L. Ed. 174.

(2) The Circuit Court of Appeals erroneously held that the presumption of correctness of the Commissioner's finding of value continued in the case after the presentation by the petitioner of substantial uncontroverted evidence showing a different value.

While it is true that the law presumes that the respondent's determination as to a question of fact is correct, that

presumption continues in the case only so long as no material evidence on the issue is introduced in evidence. Thereupon the presumption disappears from the case. *Del Vecchio* v. *Bowers*, 296 U. S. 280, 56 S. Ct. 190, 80 L. Ed. 163. Cf. *Helvering* v. *Taylor*, 293 U. S. 507, 55 S. Ct. 287, 79 L. Ed. 628.

That petitioner produced material evidence controverting the respondent's determination of value, is demonstrated hereinabove at page 9. Respondent thereafter produced no evidence whatever, and petitioner's evidence of value remained unchallenged. The appellate court, therefore, erred in holding that the presumption of correctness of the respondent's determination continued in the case after the introduction of petitioner's evidence of value.

(3) The reasoning adopted by the appellate court is unjust and fallacious.

Petitioner has pointed out that the appellate court erred, as a matter of law, in substituting its own judgment for that of the Board in reversing the Board's finding of value. That the court's reasoning was unfair and erroneous is equally manifest.

(a) The court said:

> "We think the facts in this case necessitate the rejection of selling price as the sole determinator of value. Far more equitable is the selling price less discount for years required to realize said selling price" (R. 40).

We have pointed out above that sales price was not the sole determinator of value. There was corroborating evidence not only by the witness Spencer but also by the subsequent sales.

Furthermore, the court did not apply logically the rule it announced as to use of discount. A discount method of valuation is a method whereby one arrives at the present value of a sum of money to be received in the future. In

the instant case the sum to be received in the future for the particular lots in question, *i. e.*, those sold in 1926, 1927 and 1928, was, respectively, $1.55, $1.66 and $1.77 per square foot. The court, as well as the Commissioner, *erroneously assumed* that the *future* selling price would be the *March 1, 1913* selling price. *There is no evidence in the record to support such an assumption.* The evidence points to the contrary, that is, that there would be an *increase* in selling price as time passed. The witness, Spencer, said: "We hoped for a gradual increase in sales every year because as a general rule, for every head of a family that is buried you secure four new families. That is a rule cemeteries have adopted" (R. 14); and "* * * it is a fact that as the number of lots remaining unsold decreases, the unsold lots increase in price * * * it increases for years after the cemetery is organized" (R. 12).

In addition to the foregoing, the record of sales prices shows a steady increase of from 70.2 cents per square foot in 1911 to 80 cents per square foot in 1916 (R. 12, 17), and an increase thereafter to $1.55, $1.66 and $1.77 in 1926, 1927 and 1928, respectively.

The court's assumption, therefore, was contrary not only to the anticipated facts as they existed in 1913 but also to the actual facts which corroborate the anticipated facts.

Had the court discounted the actual selling price of these lots from 1926, 1927 and 1928 to get the "present worth" as of 1913 such a method would have produced a value in excess of 72 cents per square foot. This closely approximates and corroborates the soundness of the Board's finding of 76.6 cents per square foot.

(b) The court also said that the Board's finding of value based on selling price was erroneous because:

> "while selling price is often a satisfactory way of determining value it is not always so. Heiner v. Crosby, 24 Fed. (2d) 191 (C. C. A. 3d); Chicago Ry. Equipment Co. v. Blair, 20 Fed. (2d) 10, 13 (C. C. A. 7th)" (R. 39).

In the Crosby case, *supra,* cited by the court, there was material evidence showing why, because of controlled market conditions, the quoted market selling price was not a satisfactory method of determining fair market value. In the instant case there is not even a suggestion, much less a contention, that the prices at which burial lots were being sold in this cemetery as of March 1, 1913, were not, in fact, prices representing the fair market value of those lots. Moreover in the *Crosby case, supra,* the court held that while sales of similar properties was *some* evidence of value, such evidence was not controlling in the face of other evidence of value. In the instant case the court held that sales of similar property was *no evidence* of value whatever.

In the Chicago Ry. Equipment Co. case, *supra,* also cited, the court held that the Board of Tax Appeals erred in finding that there was no evidence of the value of the property involved where there was in the record competent and material evidence bearing upon that issue. This same court in the instant case has done exactly what it reversed the Board for doing in the Chicago Ry. Equipment Co. case. Where there is competent material evidence of value in this case the court has held that there is none.

(c) The court also said:

> "An impartial view would be, we think, that the selling price of a few lots would have to give way before the more satisfactory evidence of cost price" (R. 40).

This observation apparently contains two misconceptions: first, that it is necessary to measure the value of the entire tract by the sales price of a few lots and, second, that the cost price of the property as acreage in 1909 is a fair measure of the value of individual burial lots in 1913.

Judging from its "Christmas tree" illustration (R. 39), the court apparently was moved by the hypothetical thought that 200,000 Christmas trees could not be valued on a basis

of 25 cents each where sales were made to but one hundred persons per year at 25 cents per tree (R. 39).

The intimation is that 37 acres of cemetery lands cannot be valued by the sale of 7,000 or 8,000 square feet in one year—there being 43,560 square feet in each acre.

But in 1927 only 10,979 square feet were sold (R. 17). Our problem as to the year 1927 is not to value the entire 37 acres—much of which obviously must be wastage for roads, pools, buildings, walks, shrubs, trees and fences—but to value as of 1913 the footage sold in 1927. *Fairmount Cemetery Association* v. *Helvering,* 79 Fed. (2d) 163, 165.

The 8506.10 square feet sold in 1913 should be a comparable amount with, and a reasonable index to the value as of the same time of, 10,979 square feet of the same kind of property in the same area. And the Board so held. To revert to the court's illustration—the fair selling price of 100 Christmas trees to 100 people should be a reasonable index to the fair selling price of 115 Christmas trees to 115 people, especially if sold from the same grove at the same time.

It may be observed however that the Court's Christmas tree illustration is, on the whole, not a comparable case because there was no assurance or accepted trade experience that there would be an increase in the price per unit as the number of units remaining unsold decreased.

Passing to the second misconception, the court apparently considered cost of acreage in 1909 a better indication of the value of cemetery lots in 1913 than the sales price of similar lots and similar quantities of lots in 1913.

Such a conclusion not only finds no support in the record, but is contrary to generally accepted facts. The value of unimproved farm lands cannot be compared with the value of improved cemetery lots. "Lacking the same elements of value the comparison is pointless." *Fairmount Cemetery Association* v. *Helvering,* 79 Fed. (2d) 163, 164. There is a distinction between the valuation of acreage and of subdivided lots. *Forest Preserve District* v. *Chilvers,* 344 Ill.

573, 577, 176 N. E. 720, 721. Value must be determined with reference to the uses to which property is adapted. *Boom Co.* v. *Patterson,* 98 U. S. 403, 408, 25 L. Ed. 206.

Nor does the cost of property in 1909 afford a presumption as to its value in 1913. *Burnet* v. *Houston,* 283 U. S. 223, 228, 51 S. Ct. 413, 415, 75 L. Ed. 991, 994.

The court's finding that the cost of the acreage in 1909 is a better method of determining value as of 1913 of cemetery lots than the actual selling price of similar lots in 1913 is, therefore, erroneous in fact as well as in law.

(d) The court's valuation results in the taxation of an increment in value which occurred prior to March 1, 1913.

Under the fundamental theory underlying the taxation of gain resulting from capital increase, as distinguished from the taxation of income resulting from the production or use of capital, as applied to property acquired prior to March 1, 1913, the amount or sum to be taxed is measured by the realized increase between the cost or value on March 1, 1913 (whichever is greater) and the selling price. *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 38 S. Ct. 467, 62 L. Ed. 1054. This principle has been applied uniformly by this Court to the Revenue Acts adopted under the Sixteenth Amendment. *Lucas* v. *Alexander,* 279 U. S. 573, 49 S. Ct. 426, 73 L. Ed. 851; *Burnet* v. *Logan,* 283 U. S. 404, 51 S. Ct. 550, 75 L. Ed. 1143.

If we were to compute the gain arising from the sale of the 312 square feet sold in March, 1913 (R. 17) such gain would be the difference between the selling price of 78.08 cents per square foot and (under the court's finding) 23.96 cents per square foot—a gain of 54.12 cents per square foot, or over 225 per cent over night! Obviously that was not the true gain. The only real increment that occurred subsequent to March 1, 1913, was an increment in excess of the then fair value, which under the facts obviously was in the neighborhood of 76.6 cents per square foot. Any increment in value as represented in the March, 1913 selling price of 78.08 cents per square foot must have occurred prior to

that time. Yet, under the court's finding of value, each and every square foot sold subsequent to March 1, 1913, results in a gain which includes that prior increment. To tax such prior increment is contrary to the rule announced in *Doyle* v. *Mitchell Bros. Co., supra.* On the other hand under the method applied by the Board and contended for by the petitioner only the realized increment *subsequent* to March 1, 1913, is taxed. This is fair and just and is in harmony with the spirit as well as the letter of the Revenue Acts.

Petitioner, therefore, respectfully submits that the Circuit Court of Appeals for the Seventh Circuit erred as a matter of law in substituting its judgment for that of the Board; that it erred as a matter of law in holding that the presumption of correctness of the Commissioner's determination continued in the case after material evidence controverting such determination was produced; and that its reasoning in its determination of value was fallacious, to the injury not only of this petitioner but indirectly of many others similarly situated.

CONCLUSION.

WHEREFORE, the petitioner respectfully submits that this is a case in which a writ of certiorari should be issued to review the decision of the Circuit Court of Appeals.

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CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 255.

THE ELMHURST CEMETERY COMPANY OF JOLIET, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

BRIEF FOR PETITIONER.

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No. 255.

THE ELMHURST CEMETERY COMPANY OF JOLIET, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

BRIEF FOR PETITIONER.

I.

Opinions Below.

The memorandum opinion of the United States Board of Tax Appeals is not reported. It is printed in the record at page 16. The opinion of the United States Circuit Court of Appeals (R. 38) is reported in 83 Fed. (2d) 4.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, 43 Stat. 936, 938. The judgment

of the Circuit Court of Appeals was entered March 17, 1936 (R. 41). Petition for rehearing was denied May 21, 1936. Petition for review on writ of certiorari was filed August 3, 1936.

III.

Statutes Involved.

The applicable statutes are Sec. 204(b) of the Revenue Act of 1926, C. 27, 44 Stat. 9, 16 and Sec. 113(b) of the Revenue Act of 1928, C. 852, 45 Stat. 791, 821, which are practically identical in wording and read as follows:

> "The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property * * * or, (B) the fair market value of such property as of March 1, 1913, whichever is greater."

IV.

Statement.

This case involves the determination of the basis for computing gain upon the sale of cemetery burial lots acquired as acreage in 1909 and sold as burial lots in 1926, 1927 and 1928. In its income tax return petitioner computed its profit on the basis of a March 1, 1913 value of 76.6 cents per square foot (R. 16). The respondent determined that the lots had a fair market value as of March 1, 1913 of 23.96 cents per square foot (R. 6), which was in excess of the cost (R. 11). The petitioner filed with the United States Board of Tax Appeals a petition for redetermination of the resulting proposed deficiency. The case was heard; and the Board found a value of 76.6 cents per square foot, based on average selling price of lots in the same cemetery for the year ended March 1, 1913 (R. 18), together with evidence that the reasonable expectation was that the values of the lots would increase from year to year (R. 12, 14). The Circuit Court of Appeals reversed

the Board, holding that the actual sales prices of such lots in 1913 was not a satisfactory method of determining value (R. 39, 40); that a discount method of valuation was more equitable (R. 40); that the evidence of such sales was not evidence of value; and that there was no evidence to support the Board's finding of value (R. 40). It thereupon reversed the Board, holding that the petitioner had not overcome the presumption of correctness of the respondent's determination.

The undisputed facts are as follows: In 1909 petitioner acquired 137 acres of land near Joliet, Illinois, at a cost of $60,000 (R. 11). Betwen 1909 and March 1, 1913 it developed the north 37 acres for cemetery purposes. The development consisted of construction of roads, drives, pools, leveling and grading, landscaping, planting of flowers, trees and shrubs, construction of building and fences (R. 11, 17, 5), at a cost of $35,000 (R. 17). From the acreage so improved, its sales of grave plots have since been made.

Sales each year from 1909 to 1916 were as follows:

1909	7308 sq. ft. @	73c
1910	7005.55 sq. ft. @	71.5c
1911	7312.20 sq. ft. @	70.2c
1912	6320.20 sq. ft. @	77.6c
1913	8506.10 sq. ft. @	79.5c
1913—month of March	312 sq. ft. @	78.08c
1914	.....	75.6c
1915	.....	78.1c
1916	.....	80c

Sales for 1926, 1927 and 1928 were:

1926	14,939.9 sq. ft. @	$1.55
1927	10,979 sq. ft. @	$1.66
1928	17,077.5 sq. ft. @	$1.77

(R. 12, 17.)

The average sale price of lots sold in the improved area from March 1, 1912 to March 1, 1913 was 76.6 cents per square foot (R. 15).

Inasmuch as the experience of cemeteries is that as more lots are sold the remaining lots become increasingly valuable (R. 12), and that as a general rule for every head of a family buried, four new families purchase burial lots, petitioner in 1913 expected a gradual increase in sales price per square foot each year (R. 14). Although the average annual expense for taking care of the grounds was about $4,000 there was incidental income from interments, planting flowers, care of flowers and sales of flowers to offset that expense (R. 14).

Counsel for the Government stated that the Government engineer arrived at his valuation by discounting cost over the prospective time of sale to reduce it to a present value, using the discount method of arriving at a valuation (R. 15). Beyond the statements of counsel that the respondent valued the land by formula, there is no evidence of the method by which he chose the figures at which he fixed the basis for determining gain (R. 17).

It would take from 50 and 75 years to sell all of the lots in the improved section (R. 13).

The respondent offered no evidence at the hearing (R. 15).

The Board accepted average selling price for the year ended March 1, 1913 of similar lots as a basis for the March 1, 1913 value. The Circuit Court of Appeals held that the Board erred in taking such selling price as the basis of value and held that "selling price less discount for the years required to realize the selling price" was a "far more equitable" basis (R. 40).

The court further held that "the selling price of a few lots would have to give way before the more satisfactory evidence of cost price" (R. 40).

The court also said: "The burden was upon respondent to show this valuation (by the Commissioner) was not only incorrect, but to present some evidence to support the higher figure. This burden has not been overcome in the

case before us" (R. 40). And, accordingly, it reversed the Board.

V.

Specification of Errors Intended to be Urged.

1. The United States Circuit Court of Appeals for the Seventh Circuit erred in weighing the evidence and substituting its own judgment as to the weight thereof for that of the United States Board of Tax Appeals.

2. The said court erred in holding and deciding that there was no evidence to support the Board's finding of fair market value of the properties involved as of March 1, 1913.

3. The said court erred in holding and deciding that evidence of sales of similar properties made at or about March 1, 1913 was not evidence of fair market value as of March 1, 1913, of the properties involved.

4. The said court erred in holding and deciding that the presumption of correctness of the respondent's determination of value continued in the case after the petitioner produced substantial uncontroverted evidence in conflict with such determination.

5. The said court erred in holding and deciding that where the prospective future selling price of property is greater than the present selling price thereof the present fair market value may be determined by discounting the present selling price over the period of years intervening until the probable time of sale.

6. The said court erred in not holding and deciding that if the discount method of valuation is to be applied, it should be applied to the particular lots involved and not to the entire acreage.

7. The said court erred in not holding and deciding that if the discount method of valuation is to be applied, it

should be applied in reducing the probable ultimate sales price to a present worth.

8. The said court erred in assuming, contrary to the uncontroverted facts, that the sales price reasonably to be expected in the future was as of March 1, 1913, the same as the sales price as shown by the then current sales.

9. The said court erred in holding and deciding that the cost of the property purchased as acreage in 1909 was satisfactory evidence of the fair market value as of March 1, 1913, of the cemetery lots sold in 1926, 1927 and 1928.

10. The said court erred in not granting petitioner's motion for rehearing.

VI.

Summary of Argument.

1. There is substantial evidence supporting the Board's finding of value. In weighing the evidence and substituting its own judgment for that of the Board the Circuit Court of Appeals erred as a matter of law.

2. When petitioner produced substantial evidence tending to support its valuation the presumption of correctness of the Commissioner's determination of value no longer continued in the case. It then became incumbent upon the respondent to produce evidence tending to support his determination. This he failed to do. There is no evidence in the record supporting a March 1, 1913 valuation of 23.96 cents per square foot. The sole support for that value is the Commission's determination. In reversing the Board and ordering that the Commissioner's determination be affirmed the Circuit Court of Appeals erroneously assumed that the presumption of correctness of that determination remained in the case.

3. The valuation theories of the Commissioner and of the Circuit Court of Appeals are fallacious. The thing to be

valued is the thing which was sold in the taxable years. The best measure of that value is similar contemporaneous sales in similar quantities. But if a formula (discount method) is to be used at all it should be applied to reduce to a present worth the amount to be received in the future. Furthermore, the cost of the original acreage in 1909 is not a proper measure of value of improved cemetery lots in 1913. The method used by the Circuit Court of Appeals results in the taxation of an increment in value which occurred prior to March 1, 1913.

VII.

Argument.

1. In reversing the Board the Circuit Court of Appeals erroneously passed upon the weight of evidence and made findings of fact, substituting its judgment for that of the Board.

The primary question in this case is whether or not there is substantial evidence supporting the Board's finding of value. Findings of the Board of Tax Appeals on issues of fact should be accepted by the appellate court as conclusive, if the evidence is legally sufficient to sustain them and if there was no irregularity in the proceedings. *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 600, 51 S. Ct. 608, 613, 75 L. Ed. 1289, 1299. Therefore, if there is in this case evidence legally sufficient to sustain the Board's finding of value the appellate court's reversal is erroneous.

In the instant case the Board found that the fair market value as of March 1, 1913, of the cemetery lots sold in 1926, 1927 and 1928 was 76.6 cents per square foot (R. 18). That finding was supported (a) by evidence of the sales price of lots in the same part of the same cemetery as of March 1, 1913 (R. 17, 18, 12, 13); (b) by the statement of the sole witness, Herbert W. Spencer, that he, personally, had sold most of the lots, that he had fixed the sales price by visiting a good many other cemeteries (R. 13), and that he ar-

rived at a value of 76.6 cents per square foot as of March 1, 1913, by taking the average value of lots sold in this cemetery from March 1, 1912 to March 1, 1913 (R. 15); and (c) by the fact that the actual selling price of $1.55, $1.66 and $1.77 per square foot in 1926, 1927 and 1928 (R. 12) is corroborative of the 1913 value found by the Board. These latter sums if discounted at 6 per cent compounded annually will approximate the value of 76.6 cents per square foot found by the Board.

In 1909 petitioner purchased 137 acres of land near Joliet, Illinois. It improved the north 37 acres by landscaping, leveling, laying out roads and paths, constructing pools, buildings and fences, and planting grass, trees and shrubs (R. 17, 11, 14). From this improved area its sales of grave plots have since been made (R. 17, 13).

Sales each year from 1909 to 1913 were as follows:

1909	7308	sq. ft. @ 73c
1910	7005.55	sq. ft. @ 71.5c
1911	7312.20	sq. ft. @ 70.2c
1912	6320.20	sq. ft. @ 77.6c
1913	8506.10	sq. ft. @ 79.5c
1913—month of March	312	sq. ft. @ 78.08c

(R. 17, 12).

The average sale price for the fiscal year ended March 1, 1913 was 76.6 cents, which is the price claimed by petitioner as correct (R. 15, 3, 5, 13, 18).

The sales prices for subsequent years were:

1914		75.6c
1915		78.1c
1916		80c
1926	14,939.3	sq. ft. @ $1.55
1927	10,979	sq. ft. @ $1.66
1928	17,077	sq. ft. @ $1.77

Mr. Spencer, the sole witness in the case, stated that he was connected with The Elmhurst Cemetery Company since

1909, that he had been superintendent of the company since 1913 (R. 11); that he was familiar with the property on March 1, 1913, that the purchase price of lots was established by his visiting many other cemeteries of the same class and situated near cities of about the same population and that he established the price from the price at which these other cemetery lots were selling (R. 13); that he himself sold most of the lots and that they were sold in the normal course of business and not as the result of any advertising or promotion campaign (R. 13).

Mr. Spencer further testified that the reasonable expectancy for the year 1913 was that between 7,000 and 7,500 square feet would be sold, but that "we hoped for a gradual increase in sales every year because as a general rule for every head of a family that is buried you secure four new families. That is a rule cemeteries have adopted" (R. 14). He also stated that in the cemetery business "it is a fact that as the number of lots remaining unsold decreases, the unsold lots increase in price. I have attended meetings of cemetery men at conventions where matters of this kind were discussed and so far as I have heard, the experience of cemetery men is that lots increase up to a certain point of saturation; it increases for years after the cemetery is organized" (R. 12).

The witness also stated that there was probably an average cost of $4,000 per year for maintenance and repairs but that there was sufficient additional income from interments, planting flowers and perpetual care of flowers to offset that cost (R. 14, line 33).

The witness said that he arrived at the value of 76.6 cents a square foot by taking the average value of lots sold from March 1, 1912 to March 1, 1913 (R. 15).

None of the foregoing evidence was controverted or discredited in any manner whatsoever. Mr. Spencer was the sole witness. No evidence other than the testimony of this witness was received except the oral stipulation by counsel as to the selling prices of the lots (R. 12).

This evidence sustains the Board's finding of a value of 76.6 cents per square foot as of March 1, 1913 in the following particulars:

(a) 76.6 cents was the average sales price for the fiscal year ended March 1, 1913 (R. 18).

(b) Mr. Spencer, himself a thoroughly qualified witness and officer of the company, arrived at the value of 76.6 cents per square foot by taking the average price for the year (R. 15.)

(c) The prospect as of March 1, 1913 was that the volume of sales as well as the sales prices would increase as more lots were sold (R. 14, 12).

(d) The sales prices prior to 1913 as well as those subsequent thereto confirm this belief (R. 12).

(e) If the sales prices in 1926, 1927 and 1928 be discounted to March 1, 1913 at 6% compounded annually the 1913 value will exceed 72.6 cents per square foot for the lots sold in 1926, 73.42 cents for those sold in 1927, and 73.8 cents per square foot for the lots sold in 1928. This affords a check upon, and confirms the reasonableness of, the Board's finding of 76.6 cents per square foot.

There is, therefore, substantial evidence tending to support the Board's finding of value. The Board was satisfied that the value established by this evidence was "reasonable and should be allowed" (R. 18) and it so decided.

The appellate court, however, was not satisfied with the Board's judgment as to the weight of evidence, for it held that the Board should have given no weight whatever to the current sales prices of lots, and that it should have given much weight to the original cost price of the acreage in 1909 as well as to the discount method of valuation. The court said:

> "To emphasize the weakness of selling price in certain cases, take another illustration. Assume the change from farm acreage to cemetery lots occurred January 1, 1913, and 5,000 square feet of lots had been sold at

> 76 cents per square foot during the two months following organization. Assume further that the cost on January 1 was one cent per square foot. Would the lot selling price *completely overcome* the evidence furnished by the purchase price three months earlier?'' (R. 39-40).
>
> (Italics supplied.)

The illustration, of course, is extreme. But, at most, the court's observation merely goes to the comparative *weight* of two conflicting evidences of value. It is indeed a novel rule of law that would require a trial tribunal in a civil case to rely *only* on that evidence and *only* on that theory of a case which ''completely overcomes'' all conflicting theories and evidence.

It may be observed further that the *weight* of evidence of cost as a measure of value decreases as time passes. Cost of yesterday is far more persuasive evidence of value today than cost of four years ago. Cf. *Burnet* v. *Houston*, 283 U. S. 223, 228, 51 S. Ct. 413, 415, 75 L. Ed. 991, 994.

Again the court said:

> ''An impartial view would be, we think, that the selling price of a few lots would have to give way before the more satisfactory evidence of cost price'' (R. 40).

And again the court is weighing the evidence. It says that the cost price of ''acreage'' in 1909 is better evidence of the fair sale price or fair market price of cemetery lots in 1913 than the actual sale price of lots in the same part of the same cemetery in 1913. Such an assumption goes to the *weight* of the evidence. It cannot be as a matter of law that evidence of current market price *must* ''give way'' to evidence of a four year old cost in determining value.

Moreover, it does not seem appropriate that the court should require either as a matter of law or as a matter of fact that the cost of unimproved farm land in 1909 *must* afford the measure of fair market value of improved cemetery lots in 1913. The two are not reasonably comparable.

As was said in *Fairmount Cemetery Association* v. *Helvering,* 79 Fed. (2d) 163, 164:

> "Lacking the same elements of value the comparison is pointless."

A similar observation was made by the United States Board of Tax Appeals in the recent case of *The Riverview Cemetery* v. *Commissioner of Internal Revenue.** The Board said:

> "The second issue presents the question of the March 1, 1913 fair market value of the cemetery lots sold by the petitioner in the years under consideration. From the record before us we are convinced that the prices actually received by the petitioner on or about that date for lots comparable in value to those sold in 1931 and 1932 are the best *gage* of fair market value on March 1, 1913. Other factors, such as the age of the cemetery, its proximity to Trenton, New Jersey, its fitness as a cemetery site, etc., merely emphasize the fact that land dedicated to burial purposes may have a fair market value far in excess of adjacent land devoted to strictly commercial uses. Cemetery property is unlike other land and its valuation presents factors in determining its monetary value not to be found elsewhere."

There is a distinction between the valuation of acreage and of subdivided lots. *Forest Preserve District* v. *Chilvers,* 344 Ill. 573, 577, 176 N. E. 720, 721. Value must be determined with reference to the uses to which property is adapted. *Boom Co.* v. *Patterson,* 98 U. S. 403, 408, 25 L. Ed. 206. Nor does the cost of property in 1909 afford a presumption as to its value in 1913. *Burnet* v. *Houston, supra.*

Petitioner respectfully submits that the court's conclusion that the cost of the acreage in 1909 is a better method of determining value as of 1913 of cemetery lots than the

*Unreported memorandum opinion, entered Sept. 28, 1936, Board Docket No. 78751.

actual selling price of similar lots in 1913 is an erroneous encroachment upon the prerogative of the trial tribunal. It is an attempt to weigh the evidence.

The appellate court also said:

> "We think the facts in this case necessitate the rejection of selling price as the sole determinator of value. Far more equitable is the selling price, less discount for years required to realize said selling price" (R. 40).

Again the court is weighing the different evidences of value or methods of valuation. It approves a method which in the recent case of *The Riverview Cemetery* v. *Commissioner, supra,* the Board of Tax Appeals flatly rejected. In that case the Board said:

> "We do not believe that the application of Hoskold's formula relied on by the respondent in the valuation of the cemetery property here involved is either necessary or justified."

The Board thereupon rejected the Commissioner's discount formula and used March 1, 1913 selling price as its measure of value of cemetery lots.

Moreover, in the instant case, the court erroneously assumed that the future selling price—that is the amount to be realized in the future—would be the same as the March 1, 1913 selling price. Had it applied the discount method to the amount actually received in 1926, 1927 and 1928, this "far more equitable" method would have produced approximately the same result as the method which it weighed and rejected.

The court also said:

> "Our conclusion is that the Commissioner was liberal with the taxpayer" (R. 40).

Without dwelling upon the question of whether or not the court's reasoning was sound or unsound, the fact re-

mains that it did substitute its own judgment as to questions of fact for that of the Board. It weighed the evidence and held that the Board should have given more weight to cost price of the original acreage and to selling price less discount, and should have given less weight—or rather no weight at all—to the current selling prices of similar lots.

Such action, in the face of material evidence supporting the Board's findings of value, was erroneous. *McCaughn* v. *Real Estate Land, Title and Trust Company et al,* 297 U. S. ...., 56 S. Ct. 604, 80 L. Ed. 619; *Helvering* v. *Rankin,* 295 U. S. 123, 55 S. Ct. 732, 79 L. Ed. 1343; *General Utilities Operating Co.* v. *Helvering,* 296 U. S. 200, 56 S. Ct. 185, 80 L. Ed. 174.

2. The Circuit Court of Appeals erroneously held that the presumption of correctness of the Commissioner's determination continued in the case.

The Commissioner's determination is presumed to be correct. This general principle is well established and universally accepted. But when petitioner produced substantial evidence tending to support its claimed value of 76.6 cents per square foot, the presumption that the Commissioner's determination of a value of 23.96 cents per square foot was correct disappeared from the case. The burden of proof then shifted to the Commissioner to produce evidence to sustain his theory. If it can be said that he did so* the result was merely a conflict in the evidence which, having been resolved in favor of the petitioner, is not subject to review. It was a question of fact, not of law. If, on the other hand, the Commissioner produced no evidence to sustain his theory, then there was no conflict of evidence and any decision other than that made by the Board would

*Petitioner contends that there is no evidence in the case showing or tending to show that a value of 23.96 cents per square foot is the fair market value of cemetery lots in this cemetery as of March 1, 1913. This figure arises solely from the Commissioner's determination (which is not evidence of value) and not from any evidence produced in the case.

have been erroneous as a matter of law. But in no event could the presumption of correctness of the Commissioner's determination of values continue in the case after petitioner produced substantial evidence supporting the higher value. *Del Vecchio* v. *Bowers,* 296 U. S. 280, 56 S. Ct. 190, 80 L. Ed. 163; *Lincoln* v. *French,* 105 U. S. 814, S. Ct. 15, Otto 614, 618.

The court, however, erroneously assumed the presumption still remained in the case for it directed the Board to affirm the Commissioner's determination (R. 40).

It may be noted further that the court did not order the case remanded for a finding of value by the Board, in conformity with the court's opinion as to the weight of evidence. It made its own decision as to what that value should be and ordered that the Board conform its decision accordingly. Cf. *McCaughn* v. *Real Estate Title & Trust Co., supra.*

3. The valuation theories of the Commissioner and of the Circuit Court of Appeals are fallacious.

Petitioner sold burial plots from its improved acreage in 1926, 1927 and 1928. The measure of gain or profit taxable under the revenue acts is the difference between the selling price of these burial plots and their fair market value as of March 1, 1913—the cost basis being less than such value. Sec. 204(b), Revenue Act of 1926, C. 27, 44 Stat. 9, 16, and Sec. 113(b), Revenue Act of 1928, C. 852, 45 Stat. 791, 821.

There are several methods or theories by the use of which one might attempt to ascertain the value as of March 1, 1913 of the plots sold in 1926, 1927 and 1928. One method is to ascertain the prices at which lots from the same improved portion of the same cemetery were sold at or about the same time (March 1, 1913). If the condition of development was substantially the same in 1913 as it was in 1926, 1927 and 1928 (which it was—R. 13, line 27) and if the sales in 1913 were made in the normal and ordinary course of

business (which they were—R. 13, line 1) and if the quantity sold in 1913 and used as a comparable basis was reasonably comparable with the quantity sold in 1926, 1927 or 1928 (which it was—R. 17), it would seem that such a comparative method was rational, fair and reasonably accurate.

This was the method used by the petitioner in filing its returns and in the presentation of its case before the Board; and it was the method adopted by the Board.

Petitioner does not contend that this method is exclusive. But it does contend that it is a sound method and that any other sound method that can be applied in this case will produce, within a reasonable variance, substantially the same result.

(a) *The Discount Method.*—The Commissioner, on the other hand, contends that the discount method is the proper method to apply (R. 15). The Board said:

> "Beyond statements of counsel to the effect that the respondent has attempted by formula to reduce the value of the improved land as of March 1, 1913 to present value, we are uninformed as to the method by which he chose the figures at which he fixes the basis for determining gain" (R. 17).

The court said:

> "The Board accepted the selling price of lots for the year previous as the basis of its determination of fair value. Petitioner (the Commissioner) urges that such selling price should be discounted because of the years required to dispose of the entire tract" (R. 39).

It is important to note that the "selling price" referred to is the March 1, 1913 selling price—not the ultimate selling price.

From the foregoing it seems reasonable to conclude that the respondent (the Commissioner) contended and still contends that the proper valuation method to apply was the discount method. And apparently the Circuit Court of Ap-

peals agreed with that contention for, after discussing the method of comparative sales, the court said:

> "We think the facts in this case necessitate the rejection of the selling price as the sole determinator of value. Far more equitable is the selling price less discount for years required to realize said selling price" (R. 40).

The petitioner, of course, has no quarrel with the discount method as such. If rationally applied, it should provide a check upon the results obtained by any other method. Its specific object in this case as applied by the Commissioner is to ascertain the average fair market price of lots in the improved section of the cemetery as of March 1, 1913. But, *it does seem indirect from a practical standpoint to resort to a theoretical mathematical computation or formula in order to ascertain the price at which sales of cemetery lots would take place as of March 1, 1913, when both sides have stipulated and agreed as to the prices at which the lots were then actually selling* (R. 12).

The discount method is a method of ascertaining the present worth of a sum to be received in the future. Thus, if one is to receive $1,000 ten years from now, the present worth of that $1,000 is (theoretically) the amount of money which together with adequate interest will produce $1,000 in ten years. The rate of interest is a matter of opinion, which may (and usually does) vary according to the personal opinion of the person applying the method.

As above indicated, there are three variables in the discount method. The *first* is the sum, or amount of money, to be received in the future. The *second* is the number of years, or time, intervening between the time as of which the value is to be ascertained and the time when the sum is to be received. The *third* variable is the interest rate which, of course, depends on the element of certainty, or risk, and is technically known as the "risk rate".

If we apply the discount method to the known facts in the present case, we obtain the following result:

1. The sum to be received (and which was actually received) in the future was, respectively, $1.55, $1.66 and $1.77 per square foot.

2. The time intervening was 13, 14 and 15 years, respectively.

3. The risk rate is not shown by the record.

If we reduce the $1.55, $1.66 and $1.77 received in 1926, 1927 and 1928 to a present worth as of 1913, using an interest rate of 6% compounded annually, the result is a value of 72.67 cents, 73.42 cents and 73.86 cents per square foot.

The foregoing indicates that an application of the discount method to the ultimate known sales price would tend to support rather than to oppose the Board's findings of value.

But, the Commissioner does not propose to apply his method to the known facts. He proposes to apply the discount method in an entirely different manner. He contends (a) that the sale price in the future could not be known as of 1913. Therefore (presumably) he uses the current March 1, 1913 sales prices as his starting point. He assumes that the future sales price is the same as the March 1, 1913 sales price. That is the first element (or variable) in his computation. (b) He next contends that it could not be known as of March 1, 1913 when any particular lot would be sold. Therefore, since it might take 74 years to sell all the lots, the average length of time would be 37 years. He therefore proposes (presumably) to discount the March 1, 1913 selling price over a period of 37 years (R. 25). This is the second element (or variable) in his formula. As to the third element, the interest rate, the record is silent. But, overlooking this omission, let us consider his contention or method of application.

The fallacy of his method of application lies in the assumption that the price to be received in the future is the same price that was current in 1913.

That assumption is not borne out by the record. The fact is that the sales prices did increase and that the future amounts that were ultimately received were respectively $1.55, $1.66 and $1.77 per square foot in 1926, 1927 and 1928. It would seem highly theoretical to indulge retroactively (in 1934) in an assumption known to be erroneous as early as 1926. Cf. *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U. S. 689, 697, 53 S. Ct. 736, 77 L. Ed. 1449.

Moreover, looking at the matter prospectively as of 1913, the conditions existing as of March 1, 1913 strongly indicate that an increase in price was to be expected. The average price for 1911 was 70.2 cents per square foot, for 1912 77.6 cents per square foot, for March, 1913 78.08 cents per square foot, and for the year 1913 79.5 cents per square foot.

Furthermore, as Mr. Spencer testified, they "hoped for a gradual increase in sales each year because as a general rule for every head of a family that is buried you secure four new families. That is a rule cemetery companies have adopted" (R. 14). He also testified that "as the number of lots remaining unsold decreases, the unsold lots increase in price. * * * It increases for years after the cemetery is organized" (R. 12). And we know, of course, that the sales prices in 1926, 1927 and 1928 show an increase of well over 100% in excess of the 1913 sales prices.

Therefore, the assumption that the future sales price would be 76.6 cents per square foot is not only erroneous in fact, as shown by subsequent events, but it is erroneous also when viewed in the light of the circumstances existing as of 1913.

How then can the discount method be applied? If we attempt to apply it to the entire improved area in bulk we lack the first and principle element. We know only the average length of time that will probably be required to sell all

of the lots, which in itself is merely a conjecture. But what is the average future selling price of all the lots? Certainly it is not 76.6 cents per square foot as the Commissioner and the Court erroneously assumed. So far as petitioner can ascertain, there is no reasonable manner in which this primary element, this essential starting point, could have been known or ascertained as of 1913. If respondent knew it he failed to disclose it.

If, on the other hand, the discount method is to be applied to the specific properties sold in 1926, 1927 and 1928—these being the only years in which we know the "sum to be realized in the future"*—it is obvious that no reasonable interest rate will provide a result anywhere near that contended for by the respondent. It will far more closely approximate the value found by the Board.

In the last analysis, it would not seem practicable to insist upon using a formula or method which involves several unknown elements in attempting to ascertain a fact (*i. e.*, fair selling price for burial lots) which is already known by direct observation. The petitioner contends therefore, that the discount method as applied by the Commissioner and the court is not an appropriate method of valuation in this case. But, if it is to be applied in a rational manner by reducing the amount actually received in 1926, 1927 or 1928 to a present worth as of March 1, 1913, it corroborates the Board's finding of value.

(b) *The Other Methods.*—While the respondent appears to have contended that the discount method was the proper method of valuation, the Circuit Court of Appeals went somewhat further and announced several alternative theories of valuation, which the petitioner believes to be erroneous.

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*The retroactive use of subsequent events in arriving at a valuation of a patent was approved in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.*, 289 U. S. 689, 697. 53 S. Ct. 736, 77 L. Ed. 1449. Regardless of whether such a method is primarily applicable in the instant case, it is undoubtedly appropriate as being confirmatory of the 1913 value testified to by petitioner's witness and found by the Board.

The court said:

> "While selling price is often a satisfactory way of determining value, it is not always so. *Heiner* v. *Crosby*, 24 F. (2d) 191 (CCA 3d); *Chicago Ry. Equipment Co.* v. *Blair*, 20 F. (2d) 10, 13 (CCA 7th). A purchaser of an unimproved quarter of land in Northern Wisconsin, for example, might have 200,000 evergreen trees suitable for Christmas use on his tract, and his offer to sell them to whomsoever would come and cut and carry them away for 25 cents each was accepted by one hundred persons in a single year. It would hardly be claimed that the 200,000 trees as they stood on the land were worth $50,000, especially if it be shown that the land was purchased the year before at $10 per acre."

This illustration apparently assumes that the objective in the instant case is a valuation of the entire cemetery. But the entire cemetery was not sold in 1926 or 1927 or 1928. A valuation as of 1913 of the entire 37 acres in the improved area would necessitate the valuing of land much of which, obviously, must be wastage for roads, pools, buildings, fences, walks, trees and shrubs. The record does not disclose either the total number of square feet available for sale nor the average proportion of each acre available for sale. Nor is petitioner seeking to value, as of 1913, anything except that which was sold in 1926, 1927 and 1928.

The court apparently assumed that the 8,506.10 square feet sold in 1913 was not a fair basis for valuing 37 acres, each containing 43,560 square feet. But the 8,506.10 square feet sold in 1913 should be comparable with and a reasonable index to the value, as of the same time, of 10,979 square feet of the same kind of property in the same area which were sold in 1927. And the Board so held. To restate the comparison in terms of the Christmas tree illustration—the fair selling price of 100 trees to 100 people should be a reasonable index to the fair selling price of 125 trees to 125 people, especially if sold from the same grove at the same time.

Moreover the court's illustration is not, on the whole, a comparable case because there was no assurance or expectancy or trade experience in the case of the Christmas trees that there would be an increase in price per unit as the number of units remaining unsold decreased. There was such in the case of cemetery lots.

Furthermore, in the *Crosby case, supra,* cited by the court, there was material evidence showing why, because of controlled market conditions, the quoted market selling price was not a satisfactory method of determining fair market value. In the instant case there is not even a suggestion, much less a contention, that the prices at which burial lots were being sold in this cemetery as of March 1, 1913, were not, in fact, prices representing the fair market value of those lots. Moreover in the *Crosby case, supra,* the court held that while sales of similar properties was *some* evidence of value, such evidence was not controlling in the face of other evidence of value. In the instant case the court held that sales of similar property was *no evidence* of value whatever.

In the *Chicago Ry. Equipment Co. case, supra,* also cited, the court held that the Board of Tax Appeals erred in finding that there was no evidence of the value of the property involved where there was in the record competent and material evidence bearing upon that issue. The same court in the instant case has done exactly what it reversed the Board for doing in the *Chicago Ry. Equipment Co. case.* Where there is competent material evidence of value in this case the court has held that there is none.

Petitioner respectfully submits that neither the court's illustration nor the court's reasoning is sound.

The court then said:

> "The land here in question cost respondent $440 per acre in 1909. The Board, four years later, in 1913, fixed its value at $32,000 per acre. Differently stated, the cost price in 1909 was 1.1 cents per square foot.

> The extraordinary rise must have been due solely to the change in its use for there was no evidence of rise in the value of land around Joliet from 1909 to 1913."

In making the foregoing statement, the court has made two assumptions which petitioner respectfully submit are erroneous:

First: The court apparently has read the $32,000 figure into the Board's opinion by inference. It does not appear there in words. Neither the Board nor the Commissioner indulged in any such inference as has the court. Only a portion of each acre was available for sale as burial lots. The balance was used for road, drives, walks, pools, shrubs, flowers, trees, fences and buildings (R. 11, 6, 7). Apparently the Commissioner did not assume that each acre contained 43,560 square feet of saleable property for had he done so he would have found a March 1, 1913 value of 4.9 cents per square foot instead of 13.7 cents.* Similarly, had he allocated the cost of improvements over 43,560 square feet per acre he would have allowed less than 2.2 cents per square foot instead of 10.26 cents (R. 6). It is not a fair inference to say that the Board allowed a value of $32,000 per acre. It allowed a basis of 76.6 cents per square foot for the burial lots sold in 1926, 1927 and 1928, and not for each square foot in the entire 37 acres. The most that could be said is that the Board' decision might be interpreted to mean that it allowed a March 1, 1913 value of 76.6 cents per square foot for all of the burial lots in the improved area. But that figure, obviously is far below $32,000 per acre.

However, even if a value of $32,000 per acre had been found by the Board, such a value is not out of harmony with the value of $77,000 per acre which (if computed in the same manner) is the selling price upon which the Commissioner is taxing the taxpayer ($1.77 x 43,560).

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* 43,560 × 37 acres = 1,611,720 sq. ft. $79,458.55 ÷ 1,611,720 = 4.9c per sq. ft. See Commissioner's determination (R. 6).

Second: The court assumed, when it compared a cost of 1.1 cent per square foot with a selling price of 76.6 cents per square foot, that it was comparing like things. But it was not. The total selling price of one acre in 1913 was *not* 76.6 cents times 43,560. When all of the burial lots in one acre were sold, a large part of that acre still remained unsaleable inasmuch as it was occupied by roads, pools, paths, buildings, fences, trees, shrubs and other things. How much that average wastage was is not disclosed by the record. Indeed, if respondent intended to rely on this theory of valuation by comparison of cost he should have provided the evidence to support it. But, if we assume (as the Commissioner evidently assumed, (see page 23, *supra*) that approximately one-third was available for sale, then the average selling price *for each foot* in one acre as of 1913 was 25.5 cents per square foot, which is one-third of 76.6 cents. Had the court placed the two comparatives on the same basis the comparison between them would seem somewhat less "extraordinary".

The court also said that the selling price of a few lots would "have to give way to the more satisfactory evidence of cost price" (R. 40).

As heretofore pointed out (page 11, *supra*), this statement goes primarily to the weight of the evidence and its soundness is highly questionable. Cost of unimproved acreage in 1909 affords but scant help in ascertaining the market price of improved burial lots in 1913. *Fairmount Cemetery Association* v. *Helvering, supra; Burnet* v. *Houston, supra.*

The court also said that the discount method was a "more equitable" method of determining value than that used by the Board and by petitioner. But, as above pointed out, this "more equitable" method produces approximately the same result as the Board's method when rationally applied to the known facts. Moreover, the use of a formula as a primary method of valuation is not usually resorted to where representative sales are available to establish mar-

ket values. Its virtue in such cases lies chiefly in its use as a corroborating method or check.

The court also said:

> "The statute provided that the cost of the property or 'the fair market value of such property as of March 1, 1913, whichever is greater' shall be used in determining income. The Commissioner did not limit the taxpayer to cost price but fixed a market value well in excess of that figure. *The burden was upon respondent to show this valuation was not only incorrect, but to present some evidence to support the higher figure. This burden has not been overcome in the case before us.*" (Italics supplied.)

The court evidently has completely cast aside and disregarded not only all of the evidence produced by petitioner but the findings of fact and decision of the Board of Tax Appeals as well. Petitioner submits that such action is highly arbitrary.

And, in conclusion, the court said:

> "If the circumstances make evidence of fair market value impossible or not obtainable or so uncertain and unsatisfactory as to render any findings thereon purely speculative, then the cost price must be used. Obviously, the respondent (taxpayer) cannot complain when the Commissioner, under such circumstances, fixes a valuation which is much higher than cost price" (R. 40).

The foregoing statement is not in harmony with the rule announced in *Sinclair Refining Co.* v. *Jenkins Petroleum Process Co., supra,* where, in discussing the valuation of a patent, the court said:

> "At times the only evidence available may be that supplied by testimony of experts as to the state of the art, the character of the improvement, and the probable increase of the efficiency or saving of expense (citing cases). This will generally be the case if the trial follows quickly after the issue of the patent. But

> a different situation is presented if years have gone by before the evidence is offered. Experience is then available to correct uncertain prophecy. Here is a book of wisdom that the courts may not neglect. We find no rule of law that sets its clasp upon its pages, and forbids us to look within."

Even if the court were correct in characterizing the evidence which the petitioner presented in this case as being "so uncertain and unsatisfactory as to render any finding thereon purely speculative"—an assumption which petitioner vigorously assails—nevertheless the court would still have to close its eyes to the knowledge disclosed by the sales in 1926, 1927 and 1928; for in order to arrive at a value as of 1913 by the discount method, which it has acclaimed as being a fair and proper method, it need only to have taken the actual sales prices in 1926, 1927 and 1928—the actual sums received in the future—and to have discounted those sums to a 1913 value. Thus, by "unclasping the pages" and looking into the "book of wisdom" the court might have discarded all of the evidence produced by the petitioner and it would still have arrived at a value substantially the same as that found by the Board; and the same process would have indicated that the Commissioner's determination was *grossly* erroneous.

Petitioner respectfully submits, therefore, that in the numerous particulars above pointed out the court's reasoning in reversing the Board was fallacious.

(c) The court's action results in the taxation of an increment in value which occurred prior to March 1, 1913.

Under the fundamental theory underlying the taxation of gain resulting from capital increase, as distinguished from the taxation of income resulting from the production or use of capital, as applied to property acquired prior to March 1, 1913, the amount or sum to be taxed is measured by the realized increase between the cost, or value on March 1, 1913 (whichever is greater), and the selling price. *Doyle*

v. *Mitchell Bros. Co.*, 247 U. S. 179, 38 S. Ct. 467, 62 L. Ed. 1054. This principle has been applied uniformly by this Court to the Revenue Acts adopted under the Sixteenth Amendment. *Lucas* v. *Alexander*, 279 U. S. 573, 49 S. Ct. 426, 73 L. Ed. 851; *Burnet* v. *Logan*, 283 U. S. 404, 51 S. Ct. 550, 75 L. Ed. 1143.

If we were to compute the gain arising from the sale of the 312 square feet sold in March, 1913 (R. 17) such gain would be the difference between the selling price of 78.08 cents per square foot and (under the court's finding) 23.96 cents per square foot—a gain of 54.12 cents per square foot, or over 225 per cent over night! Obviously that was not the true gain. The only real increment that occurred subsequent to March 1, 1913, was an increment in excess of the then fair value, which under the facts obviously was in the neighborhood of 76.6 cents per square foot. Any increment in value as represented in the March, 1913 selling price of 78.08 cents per square foot must have occurred prior to that time. Yet, under the court's finding of value, each and every square foot sold subsequent to March 1, 1913, results in a gain which includes that prior increment. To tax such prior increment is contrary to the rule announced in *Doyle* v. *Mitchell Bros. Co., supra.* On the other hand, under the method applied by the Board and contended for by the petitioner, only the realized increment *subsequent* to March 1, 1913 is taxed. This is fair and just and is in harmony with the spirit as well as the letter of the Revenue Acts.

Petitioner, therefore, respectfully contends that the Circuit Court of Appeals for the Seventh Circuit erred as a matter of law in weighing the evidence and substituting its judgment for that of the Board; that it erred as a matter of law in relying upon the presumption of correctness of the Commissioner's determination after material evidence controverting such determination was produced; and that its reasoning in its determination of value was fallacious, to the injury of this petitioner.

Conclusion.

WHEREFORE, petitioner respectfully submits that the decision of the Circuit Court of Appeals should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 255

THE ELMHURST CEMETERY COMPANY OF JOLIET, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 16–18) is not reported. The opinion of the United States Circuit Court of Appeals (R. 38–40) is reported in 83 F. (2d) 4.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 17, 1936 (R. 41). On May 21,

1936, the court denied a petition for rehearing (R. 42). The petition for a writ of certiorari was filed August 3, 1936. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals properly reversed the Board of Tax Appeals for its failure to consider, in fixing the March 1, 1913, value of cemetery lots, that the average lot would not be sold for many years after that date.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 9–11.

STATEMENT

The petitioner about 1909 purchased 137 acres of land in or about Joliet, Illinois, which it has since owned and operated as a cemetery. The land cost $60,000. The north 37 acres of the tract were improved for sale as burial lots by landscaping, laying out roads, constructing pools, leveling, and planting trees, flowers, and shrubbery, at a cost of about $35,000 (R. 11–12, 17). From the acreage so improved sales of burial lots have since been made by the petitioner (R. 17).

During the period from 1908 to 1913 the number of square feet sold and the average selling price per square foot were (R. 17):

1909	7,308.55 sq. ft. at 73¢	per sq. ft.
1910	7,005.55 sq. ft. at 71.5¢	per sq. ft.
1911	7,312.20 sq. ft. at 70.2¢	per sq. ft.
1912	6,320.20 sq. ft. at 77.6¢	per sq. ft.
1913	8,506.10 sq. ft. at 79.5¢	per sq. ft.
Total	36,452.60 sq. ft. at 74.03¢	per sq. ft.

and during the month of March 1913, 312 square feet were sold at an average of 78.08¢ per square foot (R. 12). The average number of square feet sold per year, during these first years of the petitioner company's existence, was slightly over 7,000 square feet, and at March 1, 1913, the fair expectancy of sales of lots for the year 1913 was between 7,000 and 7,500 square feet (R. 14).

The taxable years under review are those of 1926, 1927, and 1928. During these years the number of square feet sold and the average selling price were (R. 17):

1926	14,939.9 sq. ft. at	$1.55
1927	10,979 sq. ft. at	1.66
1928	17,077.5 sq. ft. at	1.77

In reporting its income the petitioner used fair market value as of March 1, 1913, to determine its gain in the sale of burial lots in those years. To determine this value it chose the average selling price of lots for the one year period from March 1, 1912, to March 1, 1913, which was 76.6¢ per square foot (R. 15, 17–18).

The Commissioner of Internal Revenue determined the March 1, 1913, fair market value of the property to be 23.96¢ per square foot. The fair market value as of March 1, 1913, of the unsold land in the improved tract was placed at $79,458.55, which corresponded to a value of 13.7¢ per square foot. By adding to this amount the cost of improvements, amounting to 10.26¢ per square foot, the Commissioner determined the value of 23.96¢ per square foot for the improved land on March 1, 1913 (R. 6). The respondent's determination of value was made by discounting to the then present value in the light of the prospective time of sale of the property (R. 15). The only witness at the hearing before the Board of Tax Appeals was the superintendent of the petitioner; he estimated that it would take roughly 75 years from 1913 to sell the bulk of the lots in the improved area (R. 13, 19).

The Board of Tax Appeals held that the valuation used by the petitioner, the average selling price in the year prior to March 1, 1913, was reasonable and entered judgment for the petitioner (R. 18). The respondent filed a motion with the Board to make additional findings of fact and to modify its decision, which was denied (R. 19–22), and a motion to have the order denying this motion reviewed by the full Board, which was also denied (R. 23–27). On petition for review of the Board's decision the Circuit Court of Appeals for the Seventh Circuit reversed the decision of the Board

with direction to affirm the Commissioner's determination (R. 41).

ARGUMENT

1. The only question decided by the Circuit Court of Appeals was whether the time which would elapse before the property could be sold was an element which must be considered in finding fair market value on March 1, 1913. The Circuit Court of Appeals held, as a matter of law, that in the instant case the time element must be considered in determining fair market value so long in advance of the probable date of sale. It did not pass upon the weight of evidence,[1] but reversed the Board merely because it was in error, as a matter of law, in ignoring the time element and assuming that the sale price of a few lots measured the selling price of the entire tract on March 1, 1913. The result reached in this case by the Circuit Court of Appeals was similar to the result reached by this Court in *Great Northern Ry. Co.* v. *Weeks,* 297 U. S. 135, 149–152, where

[1] The court occasionally (R. 39–40) contrasts the cost price of $440 per acre in 1909 with the $32,000 per acre value fixed by the Board for the value on March 1, 1913. This discussion is not directed toward weighing the evidence but is either an illustration of the extraordinary result reached by ignoring the time element (R. 39) or is used to point the fact that evidence of value which ignores the distant date of sale is evidence so inadequate as to preclude the taxpayer from taking advantage of the statutory alternative of choosing cost or March 1, 1913, value, whichever is greater (R. 40).

it was held that there was error, as a matter of law, in failing to take certain known factors into consideration in arriving at the value of taxed property. Manifestly, therefore, the decision of the lower court is not in conflict with cases such as *McCaughn* v. *Real Estate Land Title & Trust Co.*, 297 U. S. 606, or *Helvering* v. *Rankin*, 295 U. S. 123, where the appellate courts improperly weighed the evidence.

2. The Circuit Court of Appeals did not predicate its decision upon the presumption of correctness attaching to the Commissioner's determination. It held merely that petitioner's evidence was insufficient in point of law either to show the correct value or to convict the Commissioner of error. Thus the lower court affirmed the determination of the Commissioner because it was uncontradicted by acceptable evidence and was based upon factors which were indispensable to the determination of value on March 1, 1913, and not merely because of the presumption attaching to it. *Del Vecchio* v. *Bowers*, 296 U. S. 280, deals with the weight to be given a presumption rebutted by evidence and *Helvering* v. *Taylor*, 293 U. S. 507, relates to a determination by the Commissioner which has been shown to be erroneous. Neither is in point.

3. The petitioner contends (Br. 11–16) that the reasoning of the Circuit Court of Appeals is unjust and fallacious. This objection is plainly misfounded so far as it relates to the decision that

there must be considered the long time which must elapse before the average lot would be sold. But it appears in largest part to be based upon objections to the Commissioner's calculations independent of his discounting the sale price to the present value as of March 1, 1913. The precise basis of the Commissioner's calculation was shown in an engineer's report to him which was excluded from the record on objection by the petitioner (R. 15). Petitioner made no effort before the Board to show that the discount method of valuation should have yielded a figure higher than the Commissioner's. The only question argued to or considered by the Circuit Court of Appeals was whether the time element should have entered into the determination of value. It is therefore not open to petitioner in this Court to argue that, accepting the time element as a proper consideration, the calculation was erroneous.

The petitioner alleges that the decision in the instant case is in conflict with the decision of the United States Court of Appeals for the District of Columbia in *Fairmount Cemetery Association* v. *Helvering,* 79 F. (2d) 163. In that case the court held that the time element, "the period of holding before a market can be had", should be considered in determining the fair market value of cemetery lands otherwise ready for sale. It sustained the Commissioner's valuation of the improved lots but disapproved his valuation of the unimproved land.

Since the time element in the instant case was considered only in regard to the improved land, the decision below is supported by the *Fairmount* case, in respect to the proposition that the time element must be taken into consideration in fixing the fair market value of cemetery property as of March 1, 1913. In no other respect is there any conflict, since that was the only question decided by the Circuit Court of Appeals in this case.

CONCLUSION

The decision of the Circuit Court of Appeals is correct. There is neither conflict of authority nor an important question of law presented. It is therefore respectfully submitted that the petition should be denied.

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AUGUST 1936.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 204. (b) The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property (or, in the case of such property as is described in paragraph (1), (4), or (5) of subdivision (a), the basis as therein provided), or (B) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

* * * * *

SEC. 1003. (a) The Circuit Courts of Appeals * * * shall have exclusive jurisdiction to review the decisions of the Board * * *; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.
(U. S. C., Title 26, Sec. 641.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

* * * * *

(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or

(2) the fair market value of such property as of March 1, 1913,

whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

Treasury Regulations 69:

ART. 1591. *Basis for determining gain or loss from sale.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, is, in general, the cost of such property. * * * The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, is—

(1) The cost of such property * * *, or

(2) The fair market value of such property as of March 1, 1913, whichever is greater.

What the fair market value of property was on March 1, 1913, is a question of fact to be established by competent evidence. * * * In the case of property traded in

on public exchanges, actual sales at or about the basic date afford evidence of value, but in each case the nature and extent of the sales and the circumstances under which they were made must be considered. Thus, prices received at forced sales or prices received for small lots of property may be no real indication of the value of the property.

Treasury Regulations 74:

ART. 591. *Basis for determining gain or loss from sale.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, is, in general, the cost of such property. * * * The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, is (1) the cost of such property * * *; or (2) the fair market value of such property as of March 1, 1913; whichever is greater.

What the fair market value of property was on March 1, 1913, is a question of fact to be established by competent evidence. * * * In the case of property traded in on public exchanges, actual sales at or about the basic date afford evidence of value, but in each case the nature and extent of the sales and the circumstances under which they were made must be considered. Thus, prices received at forced sales or prices received for small lots of property may be no real indication of the value of the property.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 255

THE ELMHURST CEMETERY COMPANY OF JOLIET, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 16–18) is not reported. The opinion of the United States Circuit Court of Appeals (R. 38–40) is reported in 83 F. (2d) 4.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 17, 1936 (R. 41). On May 21, 1936, the court denied a petition for rehearing (R. 42). The petition for a writ of certiorari was

filed August 3, 1936, and was granted October 12, 1936. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals properly reversed the Board of Tax Appeals for its failure to consider, in fixing the March 1, 1913, value of cemetery lots, that many years would elapse after that date before all of the property could be sold for burial purposes.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 21–23.

STATEMENT

The petitioner about 1909 purchased 137 acres of land in or about Joliet, Illinois, which it has since owned and operated as a cemetery. The land cost $60,000. The north 37 acres of the tract were improved for sale as burial lots by landscaping, laying out roads, constructing pools, leveling, and planting trees, flowers, and shrubbery, at a cost of about $35,000. (R. 11–12, 17.) From the acreage so improved sales of burial lots have since been made by the petitioner (R. 17).

During the period from 1909 to 1913 the number of square feet sold and the average selling price per square foot were (R. 17):

1909	7,308.00 sq. ft. at 73¢	per sq. ft.
1910	7,095.55 sq. ft. at 71.5¢	per sq. ft.
1911	7,312.20 sq. ft. at 70.2¢	per sq. ft.
1912	6,320.20 sq. ft. at 77.6¢	per sq. ft.
1913	8,506.10 sq. ft. at 79.5¢	per sq. ft.
Total	36,452.05 sq. ft. at 74.03¢	per sq. ft.

During the month of March 1913, 312 square feet were sold at an average of 78.08¢ per square foot (R. 12). The average number of square feet sold per year during these first years of the petitioner company's existence was slightly over 7,000 square feet, and at March 1, 1913, the fair expectancy of sales of lots for the year 1913 was between 7,000 and 7,500 square feet (R. 14).

The taxable years under review are those of 1926, 1927, and 1928. During these years the number of square feet sold and the average selling price were (R. 17):

1926	14,939.9 sq. ft. at $1.55
1927	10,979 sq. ft. at 1.66
1928	17,077.5 sq. ft. at 1.77

In reporting its income the petitioner used fair market value as of March 1, 1913, to determine its taxable gain in the sale of burial lots in the later years. To determine this value it chose the average selling price of lots for the one year period from March 1, 1912, to March 1, 1913, which was 76.6¢ per square foot. (R. 15, 17–18.)

The Commissioner of Internal Revenue determined the March 1, 1913, fair market value of the property to be 23.96¢ per square foot. The fair market value as of March 1, 1913, of the unsold land in the improved tract was placed at $79,458.55,

which corresponded to a value of 13.7¢ per square foot. By adding to this amount the cost of improvements, amounting to 10.26¢ per square foot, the Commissioner determined the value of 23.96¢ per square foot for the improved land on March 1, 1913. (R. 6.) The respondent's determination of value included an estimate made by discounting to the then present value in the light of the prospective time of sale of the property (R. 15). The only witness at the hearing before the Board of Tax Appeals was the superintendent of the petitioner; he estimated that it would take approximately 75 years from 1913 to sell all of the lots in the improved area (R. 13, 19).

The Board of Tax Appeals held that the valuation used by the petitioner, the average selling price in the year prior to March 1, 1913, was reasonable and entered judgment for the petitioner (R. 18). The respondent filed a motion with the Board to make additional findings of fact and to modify its decision, which was denied (R. 19–22), and a motion to have the order denying this motion reviewed by the full Board, which was also denied (R. 23–27). On petition for review of the Board's decision the Circuit Court of Appeals for the Seventh Circuit reversed the decision of the Board with direction to affirm the Commissioner's determination (R. 41).

SUMMARY OF ARGUMENT

The Board erred as a matter of law in fixing the fair market value on March 1, 1913, at the figure for which isolated burial lots were being sold at that time.

The fair market value of the *entire* acreage held for sale was the basis upon which to calculate capital gain. *Reinecke* v. *Spalding,* 280 U. S. 227, 233. The sales prices of burial lots in 1913 were thoroughly unrepresentative of the price which could be obtained were the entire acreage, or any substantial portion of it, to be sold at that time. They cannot, therefore, be used as the sole evidence of fair market value. *Dayton P. & L. Co.* v. *Commission,* 292 U. S. 290, 300–301. In addition, the "sale prices" included advance payments for future services.

Value can be determined only in the light of all the relevant circumstances applicable to the particular case. *Olson* v. *United States,* 292 U. S. 246, 247. The Board overthrew the Commissioner's determination even though the taxpayer had failed to introduce evidence as to many factors relevant to the determination of fair market value of cemetery land. We complain in particular of the refusal to consider the necessary lapse of time before the bulk of the property may be sold. See *Reinecke* v. *Spalding, supra.* The court below therefore correctly reversed the decision of the Board because in ignoring this, as well as other factors

necessary to the determination of fair market value, the Board erred as a matter of law. *Great Northern Ry.* v. *Weeks,* 297 U. S. 135, 149–152.

The court below correctly affirmed the Commissioner's determination, because there was no substantial evidence to support the petitioner's attack upon this determination. Nor does there appear to be any reason of fairness why the petitioner should have a rehearing.

ARGUMENT

The sole issue in this case is the fair market value of petitioner's improved cemetery land on March 1, 1913. The Commissioner determined this value to be 23.96 cents per square foot (R. 6). The Board set aside this determination and accepted the taxpayer's figure of 76.6 cents, relying upon the evidence of contemporary sales of lots to the exclusion of all other considerations. It said (R. 18):

> We are of opinion that the valuation for which petitioner contends is reasonable and should be allowed. It is based upon actual sales, and consequently comes as closely as may be to that fair market value, so often judicially defined as the price which property will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell.

The Government does not dispute that sales price is ordinarily the best indication of fair market value. *Keystone Steel & Wire Co.* v. *Commis-*

sioner, 62 F. (2d) 458 (C. C. A. 7th); *Curtiss* v. *Commissioner,* 57 F. (2d) 847 (C. C. A. 5th); *Virginia* v. *West Virginia,* 238 U. S. 202, 212; compare *Standard Oil Co.* v. *So. Pacific Co.,* 268 U. S. 146. But this general rule seems to us to be wholly inapplicable in determining the fair market value of cemetery land. We submit that, in applying the rule to property of this nature, the Board committed reversible error of law, because: (1) sales so unrepresentative as these constitute no evidence of fair market value; and (2) the Commissioner's determination was overthrown by the board even though the taxpayer failed to introduce evidence as to other indispensable elements of fair market value; and (3) the Board failed to consider the time which must elapse before sale of the property.

1. The basis on which to compute capital gain is the fair market value on March 1, 1913, of the *entire* amount of improved land which was available for sale as cemetery lots.[1] See *Reinecke* v. *Spalding,* 280 U. S. 227, 233. The fair market value is the price which a willing seller and a purchaser willing and able to buy would set (*Chicago Ry. Equipment Co.* v. *Blair,* 20 F. (2d) 10, 13 (C. C. A. 7th); *Stiles* v. *Commissioner,* 69 F. (2d) 951 (C. C. A. 5th); *Standard Oil Co.* v. *So. Pacific*

[1] It should be noted that this method is very fair to the taxpayer in that it gives him a basis for the saleable acreage which includes all of the cost or fair market value of the non-saleable acreage upon which the improvements are located.

Co., 268 U. S. 146, 156; *New York* v. *Sage*, 239 U. S. 57, 61) were the entire saleable acreage, or a genuinely representative portion, to be sold in 1913. The price obtained on the isolated sales of a few thousand square feet in the year prior to March 1, 1913, is grossly misleading if taken as conclusive evidence of fair market value.

The relatively high price obtained for individual cemetery lots is possible only under circumstances which necessarily prevent the sales from being representative of the entire property held for sale. The purchaser of a burial lot acts on motives which are largely nonpecuniary. This attitude of prospective buyers cannot be applicable, in 1913, to more than a very small percentage of the property. To apply to the entire property the price set on the sale of a few lots is to assume the existence of this especially favorable market for *all* of the lots. This assumption is contradicted both by the record and by common sense.

Any considerable proportion of the saleable acreage could have been sold in 1913 only (a) to a commercial purchaser or (b) by drastically slashing the price to obtain wide purchases by those who otherwise would not buy. It requires no argument to demonstrate that one who purchased a cemetery in order to obtain a business income would not pay more than a small fraction of the price currently received on the sales of isolated lots; the time required to sell the bulk of the property, the uncertainty of the future markets, and the

expense of upkeep would greatly reduce this figure. It is equally plain that any attempt to sell a substantial amount to individual purchasers would require a tremendous reduction in price. The potential purchasers of cemetery lots are necessarily restricted in number and the market for burial lots could be expanded, if at all, only by a great decrease in price.

In addition, the selling price of the lots included an advance payment for future services. The taxpayer's witness testified (R. 13–14):

> Every grave and lot in the cemetery sold since its organization is under perpetual care, and when perpetual care is provided, it means keeping the roads and drives in proper repair, keeping the drainage system in proper repair, keeping the fences in repair, cutting the grass, pruning the trees, shrubs, and keeping it in good condition. It is difficult to say how much it would cost to maintain the cemetery * * * but I would say that it would cost about $4,000.00 a year.

It is plain that the fair market value cannot be obtained by use of sale price unless appropriate reduction in the sale price be made because of this factor;[2] otherwise the valuation would include

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[2] The income realized from miscellaneous sources, such as the charges for interring, planting, and care of flowers, etc., would offset these expenses (R. 14). But this is a casual income and not derived from every lot owner. It cannot properly be used to offset the necessary reduction in sale price because of the perpetual care agreement.

both the land and the amount charged for future services.

The rule that sales may ordinarily be taken as the best evidence of fair market value has no application to this case. It seems plain that the 1913 sales were thoroughly unrepresentative and cannot be taken to be evidence of fair market value sufficient to justify disregard of the Commissioner's determination. *Dayton P. & L. Co.* v. *Commission,* 292 U. S. 290, 300–301; *Heiner* v. *Crosby,* 24 F. (2d) 191, 193 (C. C. A. 3d); *Walter* v. *Duffy,* 287 Fed. 41 (C. C. A. 3d).

2. Valuation is a process which requires that all relevant factors be considered. *The Minnesota Rate Cases,* 230 U. S. 352, 434; *Standard Oil Co.* v. *So. Pacific Co., supra,* 156; *Los Angeles Gas Co.* v. *R. R. Comm'n,* 289 U. S. 287, 306. No inflexible rule, governing all cases, can be laid down by which to determine what factors are relevant. *Rowley* v. *Chicago & N. W. Ry.,* 293 U. S. 102, 109. The selective process must necessarily be one based on the particular circumstances of the case in hand: *Olson* v. *United States, supra.* Nor can the relevant factors be expected to point to an identical result; valuation "is not a matter of arithmetical calculation." *Rowley* v. *Chicago & N. W. Ry., supra,* 109. It results that the legal canons of valuation require that no relevant factor be disregarded (since the result would in all likelihood be different if it, too, were considered) and that the

relevance of factors which may indicate fair market value must be determined with regard to the type of property being valued.

Since in this case the Board could not rely on the 1913 sales price as conclusive evidence of fair market value, it committed reversible error of law in setting aside the Commissioner's determination when the taxpayer had submitted no evidence to indicate that, if the 1913 sales price were considered with the other relevant factors, the Commissioner's determination was wrong. We cannot attempt to enumerate the factors which must necessarily be considered in determining the fair market value of cemetery land. It may, however, be suggested that these factors would include at least some of the following: (a) estimated time before sale; (b) the social standing of those who have already purchased lots; (c) any general tendency of cemetery lots to increase in value; (d) the proximity to urban centers; (e) the extent and character of the improvements (shrubs, roads, etc.); (f) the character of the neighborhood in which the cemetery is located; (g) the size and population trend of the community served; and (h) the number and character of competing cemeteries and the prices charged by them. None of these factors would be capable of calculation with absolute precision. But it is plain that most of them were reasonably foreseeable in 1913. They should not, therefore, be ignored in the determination of fair

market value in that year. *Ithaca Trust Co.* v. *United States,* 279 U. S. 151; *Lucas* v. *Alexander,* 279 U. S. 573; *Reinecke* v. *Spalding, supra; Johnson* v. *United States,* 44 F. (2d) 244 (C. Cls.); *Robertson* v. *Routzahn,* 1 F. Supp. 355, affirmed, 75 F. (2d) 537 (C. C. A. 6th); *Patterson* v. *Commissioner,* 42 F. (2d) 148 (C. C. A. 2d).

3. The factor which we wish particularly to stress is the length of time which must elapse before sale. This factor is a necessary and an important qualification of any finding of cemetery value, and the record contains sufficient evidence to demonstrate sweeping error in the Board's reasoning and findings.

Unlike other forms of real property, cemetery lots cannot be sold *en bloc* at any given moment, but must be sold gradually over a period of several generations.[3] Plainly, a lot which, if sold, would be worth $100 does not now have a fair market value of $100 if it probably cannot be sold for 50 or 75 years in the future. In this case, the taxpayer's witness testified that it would take 70, 80, or, more probably, 95 years from 1913 to sell the bulk of the cemetery lots.[4] Assuming, conservatively, that it would take 85 years to sell all the lots, and that an

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[3] Of course, a commercial purchaser could buy the entire remaining tract, but his price would correspondingly be reduced in view of this consideration.

[4] It is not completely clear that the witness was, as we have assumed, estimating the time from 1934 rather than 1913. See Record 13, 19. So far as the principle is concerned, it is immaterial what the actual estimate was.

equal number are sold each year, the present worth of the average lot would be only 23 cents on the dollar expected to be realized upon the eventual sale.[5]

The Board entirely disregarded the time element and gave no consideration whatever to the undisputed fact that the lots could not all be sold in 1913 but must of necessity be sold in small fractions of the whole over a period of perhaps 85 years. Any valuation is illusory which accepts the high figure set by current sales of isolated fragments of the whole and at the same time disregards the length of time necessary to dispose of the property in a manner such as to realize these high prices.

This Court has held in *Reinecke* v. *Spalding*, 280 U. S. 227, that it is error to fail to consider the time element. There it reversed the lower courts in a suit for refund because the taxpayer's evidence of the depletion basis for a royalty right was insufficient to support the burden resting on her. The Court stated (p. 233) that "Manifestly, the fair market value of this interest in 1913 was

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[5] It may be assumed that it will be 85 years from 1913 before the lots would all be sold. If an equal number were sold each year, and if present worth were discounted at 5% compounded annually, the present value would be about 23 cents on the dollar. (The figure is derived by adding the amounts given in a present worth table for each of 85 periods and dividing by 85. A table is found in *Paton*, Accountants' Handbook, pp. 1734–1735.)

of the whole acreage held for sale.[8] The petitioner's second misconception is that the Commissioner applied the discount method to the prices received in 1913 (Br. 19–20). The record does not show the value which the Commissioner discounted to present worth. Thus each of petitioner's objections to the use of the discount method in this case is unfounded. It results that the Board erred in refusing to consider this factor.

Petitioner seeks to support the Board's finding of fair-market value on March 1, 1913, by evidence of the prices received for lots in 1926–1928 (Br. 18). Apart from the objection that these, too, were unrepresentative sales, it is well settled that subsequent events may not be considered in determining value. *Ithaca Trust Co.* v. *United States, supra; International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 222; *Lewellyn* v. *Elec. Reduction Co.,* 275 U. S. 243; *New York* v. *Sage, supra,* p. 61.

Petitioner argues (Br. 10–14) that the court below weighed the evidence. It is immaterial whether or not the court weighed the evidence be-

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[8] This error explains petitioner's perplexity that, under the Commissioner's valuation, there would be a tremendous gain realized over night in the case of a sale in March 1913 (Br. 27). The isolated sale of a single lot would, of course, be at a price much higher than the average fair market value of the entire property held for sale, in the determination of which allowance is made either for the lower price realized if a substantial portion of the property were to be sold at once or for the length of time necessary to obtain the high price realized on sales of single lots.

fore the Board, for it is plain that its judgment of reversal was required because of the Board's errors of law. However, we wish to point out that the court below did not pass upon the weight of evidence,[9] but reversed the Board merely because it was in error, as a matter of law, in ignoring the time element and assuming that the sale price of a few lots measured the selling price of the entire tract on March 1, 1913.

The court below directed that the determination of the Commissioner be affirmed. This resulted from its view that the taxpayer had introduced no substantial evidence to overcome the presumption of correctness which attaches to the Commissioner's determination (R. 40).

The Commissioner's determination of fair market value was made on a basis not shown by the record.[10] The valuation cannot be shown to be

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[9] The court occasionally (R. 39–40) contrasts the cost price of $140 per acre in 1909 with the $32,000 per acre value fixed by the Board for the value on March 1, 1913. This discussion is not directed toward weighing the evidence but is either an illustration of the extraordinary result reached by ignoring the time element (R. 39) or is used to point the fact that evidence of value which ignores the distant date of sale is evidence so inadequate as to preclude the taxpayer from taking advantage of the statutory alternative of choosing cost or March 1, 1913, value, whichever is greater (R. 40).

[10] It was based on an engineer's report. The taxpayer objected to its introduction and cannot, therefore, object that the Commissioner's method is not disclosed. The statement of Government counsel as to the methods used in the report is not evidence, as petitioner seems to concede (Br. 9), and is demonstrably erroneous or inadequate. Had it been

wrong merely by introducing evidence which might point to another result. The determination of the Commissioner of Internal Revenue is *prima facie* correct and the burden is on the taxpayer to establish that the Commissioner's determination is incorrect. *Burnet* v. *Houston,* 283 U. S. 223; *Welch* v. *Helvering,* 290 U. S. 111. In making his determination the Commissioner is presumed to have brought to his aid the technical skill and knowledge of trained assistants. *Portage Silica Co.* v. *Commissioner,* 49 F. (2d) 985, 987 (C. C. A. 6th), certiorari denied, 284 U. S. 667. Accordingly the taxpayer's evidence must be such as will affirmatively disclose a different valuation to be more nearly correct than that of the Commissioner. Petitioner's argument to the contrary (Br. 14–15) confuses the burden of proof resting on the taxpayer with the mere burden of going forward with the evidence.

It seems plain that the record contains nothing to show that the Commissioner's determination was either arbitrary, erroneous, or excessive. Compare *Helvering* v. *Taylor,* 293 U. S. 507. The sole evidence introduced by the taxpayer to overcome this determination consisted of the sales prices obtained in 1913 and in the years 1926–1928. We

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merely based on cost (1.1 cents, R. 6) plus improvements (10.26 cents, R. 6), the value, prior to discounting, would have been but 11.36 cents per square foot. If discounted, this figure would be reduced to roughly 2.6 cents per square foot. (See footnote 5, *supra,* p. 13.) Instead, a value of 23.96 cents per square foot was allowed (R. 6).

have shown that the 1913 prices are grossly inadequate as a guide to fair market value and that the 1926–1928 prices are not only equally inadequate but, because they could not be foreseen in 1913, irrelevant as well. It follows that the Commissioner's determination was substantially uncontradicted and that the taxpayer's evidence was wholly consonant with the Commissioner's determination. In such a situation the court below properly directed that the Commissioner's determination be affirmed.[11]

Nor does this case fall within that elastic category of cases in which considerations of fairness suggest that the appellate court might properly direct a rehearing before the Board, or empower the Board to entertain such an application. (1) The Board's erroneous theory of law became apparent only after the taxpayer had submitted his case for decision, and the record contains no other indication that the taxpayer was misled by the Board's

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[11] In other cases, the situation might arise that the taxpayer had introduced sufficient substantial evidence tending to overcome the Commissioner's determination so that the appellate court could not, in reversing for error of law, affirm the Commissioner's determination without weighing the evidence before the Board. In such a case the appropriate procedure would seem to be to remand to the Board with directions for that tribunal, proceeding upon a correct theory of law, to decide whether the Commissioner's determination should be affirmed or a rehearing directed. Compare *Landis* v. *North American Co.*, No. 221, October Term, 1936, decided December 7, 1936. The Government does not believe the taxpayer's evidence in this case to be of weight sufficient to call for this procedure.

erroneous theory. (2) The taxpayer before the Board understood that the Government viewed the time which must elapse before sale of the lots as an indispensable factor in the determination of fair market value, and yet chose to offer no evidence which would tend to disprove the Commissioner's determination if this element were considered. (3) The taxpayer objected, because the engineer who made the report was not available for cross-examination, to the introduction of the report which set forth in full the basis of the Commissioner's determination: had it wished to attack the Commissioner's determination the engineer was available upon subpoena by the taxpayer.

CONCLUSION

It is therefore respectfully submitted that the decision of the court below should be affirmed.

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DECEMBER 1936.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9, 16, 110:

SEC. 204. (b) The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property (or, in the case of such property as is described in paragraph (1), (4), or (5) of subdivision (a), the basis as therein provided), or (B) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

* * * * *

SEC. 1003. (a) The Circuit Courts of Appeals * * * shall have exclusive jurisdiction to review the decisions of the Board * * *; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.

(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require. (U. S. C., Title 26, Sec. 641.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 818:

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

* * * * *

(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be:

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided), or (2) the fair market value of such property as of March 1, 1913, whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

Treasury Regulations 69:

ART. 1591. *Basis for determining gain or loss from sale.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, is, in general, the cost of such property. * * * The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, is—

(1) The cost of such property * * *, or

(2) The fair market value of such property as of March 1, 1913, whichever is greater.

What the fair market value of property was on March 1, 1913, is a question of fact to be established by competent evidence. * * * In the case of property traded in on public exchanges, actual sales at or about the basic date afford evidence of value, but in each

case the nature and extent of the sales and the circumstances under which they were made must be considered. Thus, prices received at forced sales or prices received for small lots of property may be no real indication of the value of the property.

Treasury Regulations 74:

ART. 591. *Basis for determining gain or loss from sale.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, is, in general, the cost of such property. * * * The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, is (1) the cost of such property * * *; or (2) the fair market value of such property as of March 1, 1913; whichever is greater.

What the fair market value of property was on March 1, 1913, is a question of fact to be established by competent evidence. * * * In the case of property traded in on public exchanges, actual sales at or about the basic date afford evidence of value, but in each case the nature and extent of the sales and the circumstances under which they were made must be considered. Thus, prices received at forced sales or prices received for small lots of property may be no real indication of the value of the property.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

No. 255.—October Term, 1936.

The Elmhurst Cemetery Company of Joliet, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 1, 1937.]

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioner, in 1909, purchased one hundred and thirty-seven acres of land near Joliet, Illinois, for $60,000.00. Thirty-seven acres were divided into plots and developed for cemetery purposes by grading, constructing drives, planting shrubbery, etc., at a cost of $35,000.00. Grave plots, varying in area from 150 to 1,500 square feet, were sold from time to time under contracts for perpetual care.

Some 36,000 square feet were disposed of during the years 1909 to 1913 at prices ranging from 70.2 cents to 79.5 cents. The average between March 1, 1912, and March 1, 1913, was 76.6 cents. In the three years 1926, 1927, and 1928, 42,000 square feet were sold for $1.55 to $1.77. To determine the taxable gains realized from the latter sales it became necessary to ascertain the value of the lots as of March 1, 1913. The petitioner's return estimated this at 76.6 cents. The Commissioner adopted 23.96 cents and assessed deficiencies accordingly.

Upon petition for redetermination the Board of Tax Appeals, after considering the evidence, approved the 76.6 cents valuation and found no deficiencies. The evidence consisted of a stipulation by counsel concerning sales in 1909 to 1913 as detailed above, and the testimony of the Cemetery Superintendent.

He stated the original cost of the one hundred and thirty-seven acres, expense of development, area sold in 1926, 1927, 1928, and prices obtained. He affirmed familiarity with the property on March 1, 1913, prices then prevailing, and stated that the sales of 1912 and 1913 were in normal course without extra effort. Also

that "the purchase price was established by my visiting a good many cemeteries that I figured were practically of the same class as that cemetery and situated near cities of about the same population, and I established a price from the price they were selling at." Further that "every grave and lot in the cemetery sold since its organization is under perpetual care, and when perpetual care is provided, it means keeping the roads and drives in proper repair, keeping the drainage system in proper repair, keeping the fences in repair, cutting the grass, pruning the trees, shrubs, and keeping it in good condition." "We hoped for a gradual increase in sales every year because as a general rule, for every head of a family that is buried you secure four new families. That is the rule cemetery companies have adopted." He thought it might take seventy-five years to dispose of all lots.

The Board declared "the parties are now concerned only with the value as of March 1, 1913, of that thirty-seven acres of petitioner's lands which have been improved and from which sales have been made." "Beyond statements of counsel to the effect that respondent [Commissioner] has attempted by formula to reduce the value of the improved land as of March 1, 1913, to present value, we are uninformed as to the method by which he chose the figures at which he fixes the basis for determining gain. Petitioner, however, has chosen as the footage valuation as of March 1, 1913, the selling price of its grave lots during the year just preceding that date—76.6 cents—which is less than the average sales price during the month of March, 1913. We are of opinion that the valuation for which petitioner contends is reasonable and should be allowed. It is based upon actual sales, and consequently comes as closely as may be to that fair market value, so often judicially defined as the price which property will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell."

Lots disposed of in 1912 and 1913 went with agreements for perpetual care; so did those sold in 1926, 1927, and 1928; prices obtained in the latter years may be compared with those received in the earlier ones—they were for like things.

The Commissioner asked review by the Circuit Court of Appeals. He there urged that March 1, 1913, values should be ascertained by discounting sale prices during the preceding twelve months because of the time which would be required in order to dispose

of the whole. The Court said: "The facts in this case necessitate the rejection of the selling price as the sole determinator of value. Far more equitable is the selling price less discount for years required to realize said selling price." "The Commissioner was liberal with the taxpayer." Accordingly it reversed the Board and directed affirmance of the Commissioner's assessment.

This action, we think, amounted to an unwarranted substitution of the Court's judgment concerning facts for that of the Board. There was substantial evidence, as appears above, to support the latter's conclusion, and in such circumstances this must be accepted. It is the function of the Board to weigh the evidence and declare the result. We undertook to state the applicable rule in *Helvering* v. *Rankin,* 295 U. S. 123, 131, and *General Utilities and Operating Company* v. *Helvering,* 296 U. S. 200, 206.

The judgment here complained of must be reversed. The action of the Board of Tax Appeals is affirmed.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.